THE UNIVERSITY OF QUEENSLAND

AUSTRALIA

The Queen's Ministers of State for the Commonwealth: The Relationship between the Prerogatives of the Crown and the Executive Power of the Commonwealth

Ryan William Haddrick

LLB *JamesCook*, LLM *QldUT*, GradDipLegPrac *ANU*

A thesis submitted for the degree of Doctor of Philosophy at

The University of Queensland in 2017

T.C. Beirne School of Law

ABSTRACT

The orthodox view is that the prerogatives of the Crown are textually incorporated, or sourced, in the language of s 61 of the Australian Constitution. This work challenges that assumption by examining the text, structure and history of ss 2, 61 and 64 of the Constitution. In particular, the inclusion of the words "under the Crown" and "shall be the Queen's Ministers of State for the Commonwealth" in the preamble and s 64 respectively are, it is argued, textual indicators (and devices) that the prerogative is textually recognised or affirmed by those provisions, and ought to be seen as emanating from the Crown, and recognised by common law – and not as emanating from s 61 of the Constitution.

Having argued that the executive power of the Commonwealth (that is, s 61) is not the textual source, or recognition, of the prerogatives of the Crown, this dissertation then posits a theory as to how s 61 should be construed. True to its Montesquieuian heritage, it is argued that the executive power of the Commonwealth ought to be understood in a functionalist sense.

The evidence considered to support these propositions is the text, structure and history of the constitutional provisions. In particular, this dissertation examines the historical concept of the prerogatives of the Crown; the way that body of constitutional doctrine became part of the Australian constitutional landscape; and how the prerogative was understood to operate in pre-Federation Imperial and colonial case law.

The Debates of the Constitutional Conventions of the 1890s are closely examined to ascertain how the framers sought to affirm the operation of the prerogative, and what interpretative assistance the Debates might give in the construction of ss 2, 61 and 64 of the Constitution. A particular focus is placed upon the decision of the Full Court of the Supreme Court of Victoria in *Toy v Musgrove* (1888) 14 VLR 349, as the reasoning in that widely reported case figures prominently in the framers' deliberations; and it is therefore of significant interpretative assistance.

This dissertation offers a theory about the way the prerogative was textually affirmed in the Constitution, and what the consequence of that recognition is for the construction of the executive power of the Commonwealth.

DECLARATION BY AUTHOR

This thesis is composed of my original work, and contains no material previously published or written by another person except where due reference has been made in the text. I have clearly stated the contribution by others to jointly-authored works that I have included in my thesis.

I have clearly stated the contribution of others to my thesis as a whole, including statistical assistance, survey design, data analysis, significant technical procedures, professional editorial advice, and any other original research work used or reported in my thesis. The content of my thesis is the result of work I have carried out since the commencement of my research higher degree candidature and does not include a substantial part of work that has been submitted to qualify for the award of any other degree or diploma in any university or other tertiary institution. I have clearly stated which parts of my thesis, if any, have been submitted to qualify for another award.

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Publications During Candidature

No Publications

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No Publications

Contributions by Others to the Thesis

No Contribution By Others

Statement of Parts of the Thesis Submitted to Qualify for the Award of Another Degree

None

ACKNOWLEDGEMENTS

This dissertation has been more than five years in the making, and could not have been completed without the support of a number of people.

First and foremost, I record my gratitude and sincere appreciation to my principal academic supervisor, Professor Nicholas Aroney, Professor of Constitutional Law at the University of Queensland's T C Beirne School of Law. I am very grateful for Professor Aroney's patience and guidance in assisting me to complete this body of research over a number of years. I am particularly grateful for his encouragement of me to refine my thinking about constitutional interpretation, and encouraging me to think about, and structure my research around, the framework of the various tools of constitutional interpretation, and for introducing me to a number of constitutional authors I was not previously familiar with. I am also grateful for Professor Aroney's encouragement to undertake my research with the degree of depth, rigour and analysis required to do justice to the subject-matter.

I am also grateful to my associate academic supervisors, Professor James Allan, and Professor Anthony Cassimatis, for their guidance and assistance.

I record my appreciation to the Honourable Justice P A Keane AC of the High Court of Australia, who kindly read the near-complete manuscript and reviewed the dissertation. I also record my appreciation to Ms Katherine Store who also kindly read and gave me detailed advice on the manuscript.

Whilst I am appreciative of the suggestions and criticisms of those who have read the manuscript, any errors are solely mine, and should not be attributed to those who read or reviewed the manuscript at its various stages of completion.

Naturally, I also record my appreciation to my family for their support and encouragement in undertaking this research over a number of years – thank you to Lawrie, Helen, Mathew, Nicole, Michelle and Andrew.

Finally, I record my appreciation to Natalie who has been my partner in this long journey. I would not have been able to establish myself at the Queensland Bar and undertake the work associated with researching and writing this dissertation without Natalie's forbearance, support, understanding, and encouragement.

R W HADDRICK

Chambers
Brisbane
9 May 2017

KEY WORDS

executive power of the commonwealth; executive power; prerogative; royal prerogative; prerogatives of the crown; judicial review of the executive power; non-statutory executive power; toy v musgrove; federation conventions.

AUSTRALIAN AND NEW ZEALAND STANDARD RESEARCH CLASSIFICATIONS (ANZSRC)
ANZSRC code: 180108, Constitutional Law, 90%
ANZSRC code: 180103, Administrative Law, 10%

FIELDS OF RESEARCH (FOR) CLASSIFICATION
FoR code: 1801, Law, 100%

DEDICATION

This work is dedicated to the memory of
The Reverend William Edward Vivian Haddrick
and
Myra Nell Haddrick

and to the memory of
Audrey Winifred Eyres

This work is also dedicated to
Samuel Ronald Eyres OAM

CONTENTS

TABLE OF ABBREVIATIONS

Con. Deb. Melb, 1890	*Official Record of the Proceedings and Debates of the Australasian Federation Conference, Melbourne 1890*, R S Brain (Government Printer), Melbourne, 1890.
Con. Deb. Syd, 1891	*The Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April 1891*, G S Chapman (Acting Government printer), Sydney, 1891.
Con. Deb. Adel, 1897	*The Official Report of the National Australasian Convention Debates, Adelaide, March 22 to May 5, 1897,* C E Bristow (Government Printer), Adelaide, 1897.
Con. Deb. Syd, 1897	*Official Record of the Debates of the Australasian Federal Convention, Second Session, Sydney, 2nd to 24th September 1897,* W A Gullick (Government Printer), Sydney, 1897.
Con. Deb. Melb, 1898	*Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 20th January to 17 March 1898,* (Volumes I & II), R S Brain (Government Printer), Melbourne, 1898.

The collective reference to these five publications of Debates and Proceedings of the Federation Conventions is often shortened to *Official Records* or *Official Reports*, or simply as the "Debates", throughout this dissertation.

GLOSSARY

Australian Constitution refers to the Constitution. This variant is used when a distinction is being drawn in the text between the *United States Constitution*, or, on occasions, the *British North America Act 1867*, and the context requires emphasis on the fact that it is the Australian Constitution being identified.

Commonwealth of Australia (or "***the Commonwealth***") refers to the body politic established by the enactment of the *Commonwealth of Australia Constitution Act 1900* (Imp).

Commonwealth of Australia Constitution Act 1900 **(Imp)** is the enactment of the Imperial Parliament establishing the Commonwealth of Australia.

Constitution refers to the contents of clause nine of the Constitution Act – being, the original one hundred and twenty-eight sections of the Constitution, as amended, and the contents of the Schedule which sets out the oath and the affirmation, including the "Note" to the Schedule which refers to the name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being.

Constitution Act refers to the *Commonwealth of Australia Constitution Act 1900* (Imp). When the Constitution Act is referred to, it should be understood that the author is referring to the entire enactment, being the preamble, the nine covering clauses, and the contents of clause nine, being "The Constitution".

Constitutional Conventions (or the *"**Federation Conventions***") is a reference to the First and Second Conventions collectively. These expressions do not, unless a contrary intention is expressed, include the other conventions or assemblies convened during the

Federation decade to consider the question of federation, or promote the object and purposes of the Federation movement. For example, the Australasian Federation Conference, which was held in Melbourne in 1890, and saw the premiers or chief secretaries of the colonies, and other senior colonial statesmen, assemble to agitate for momentum in the Federation movement.

Debates (or the "***Convention Debates***") refers to the *Official Reports* and *Official Records* of the Federation Conventions.

Executive power of the Commonwealth is the subject of examination and reflection in this dissertation. Chapter 5 sets out what this author posits as the correct construction of the scope of the executive power of the Commonwealth, which is able to be arrived at once the true relationship between the prerogative and the executive power of the Commonwealth is appreciated.

First Convention refers to the Australasian Federal Convention, held in Sydney in March and April of 1891.

The framers refers to the delegates appointed by their respective colonies to the Australasian Federal Convention, held in Sydney in 1891, and the representatives who were elected (or nominated by the Parliament in the case by the Western Australian delegates) to the three sessions of the National Australasian Convention held in Adelaide, Sydney and Melbourne in 1897 and 1898. Unless the context reveals otherwise, the expression "the framers" is not intended to refer to Crown law officers, the officials in Whitehall, or the members of the Imperial Parliament who were all, at various stages, involved in the drafting of the constitutional text. In constitutional literature, the expression "*the founders*" is sometimes used. This expression is avoided in this work (unless used in the American context); preferring to focus upon the authors of the constitutional text being

the persons who "framed" the language, rather than the wider meaning that "founders" suggests.

The prerogative (or the "***prerogatives of the Crown"***, or the *"**royal prerogative"***) is the subject description and reflection in Chapter 2. What is included within the prerogative, and its relationship with the executive power, is central to the purpose of this dissertation and necessarily requires a historically-focused description.

Second Convention refers to the three sessions of the National Australasian Convention, held in Adelaide in 1897, then Sydney and Melbourne in 1898.

PREFACE

This dissertation is the result of over a decade of thinking about what Sir Ninian Stephen described as "the notoriously obscure area"[1] of the prerogatives of the Crown, and the prerogative's relationship with the executive power.

As the author has noted elsewhere,[2] immediately after the announcement of his appointment as the Solicitor-General of the Commonwealth, Stephen Gageler SC (as his Honour then was) remarked to *The Australian* newspaper that Chapter III of the Constitution "is where the action is".[3] The new justice of the High Court of Australia was drawing attention to the importance, or preponderance, of the High Court of Australia's more recent Chapter III jurisprudence which could be measured by way of such cases as *Kable v Director of Public Prosecutions (NSW)*,[4] and the many cases that followed in which litigants sought to apply what has come to be known as the *Kable* principle.[5]

This is no longer the case. Chapter II of the Constitution is now where the action is. Chapter II is the new frontier. The preponderance of executive power cases of recent times has meant that the battlefield of Australian constitutional law is currently focused upon Chapter II jurisprudence.[6] What is, or is not, within the executive power of the

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1 N M Stephen, "Foreword", in H V Evatt's *The Royal Prerogative*, 1987, v.

2 R W Haddrick, "The Judicature, Bills of Rights, and Chapter III" in J Leeser, R Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights*, 145.

3 M Pelly, "Black-belt Solicitor-General says he lacks the killer instinct", *The Australian*, 18 July 2008, 33.

4 (1996) 189 CLR 51.

5 *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146; *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Thomas v Mowbray* (2007) 233 CLR 307; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

6 Illustrated by *Pape v Commissioner of Taxation* (2009) 238 CLR 1 ("*Pape*"); *Williams v Commonwealth [No 1]* (2012) 248 CLR 156 ("*Williams [No 1]*"); *Williams v Commonwealth [No 2]* (2014) 252 CLR 416 ("*Williams [No 2]*"); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 ("*CPCF*"); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 ("*Plaintiff M68*").

Commonwealth is now a highly contested area in constitutional litigation, particularly in respect of the contents of the non-statutory executive power.

This dissertation is an examination of the relationship between the prerogatives of the Crown – that is, those rights, privileges, immunities and capacities that the Crown enjoys and are recognised by the common law, and the constitutional authority described as the executive power of the Commonwealth.

With the Debates of the Australian Federation Conventions from the 1890s now a permissible, and indeed regular tool of constitutional interpretation,[7] this author presents an argument about the relationship between the prerogative and the executive power that draws upon British and Australian colonial jurisprudence, and takes account of the significant historical evidence left by the framers in the Federation Conventions as to how the key provisions of the *Commonwealth of Australia Constitution Act 1900* (Imp) were intended to operate.

In reading the Debates, what is striking is the depth of analysis in which the framers delved in attempting to ensure that the constitutional text properly reflected their authorial intentions – which was to textually affirm the devolution or investment of the prerogative of the Crown in the new Commonwealth polity. This dissertation argues that the sophistication of the in-committee consideration of the key draft clauses warrants judicial attention. And, contrary to the view expressed by French CJ, provides significant interpretative assistance.[8]

The originality of this dissertation arises in three ways. First, its invocation of history to separate the concepts of the prerogative and the executive power of the Commonwealth, and, by doing so, its focus upon the history of the prerogative as *a quality* of the Sovereign's title. Second, the dissertation looks to the framers' intention, as revealed through the use of the Debates and their reliance upon the Supreme Court of Victoria's

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7 *Cole v Whitfield* (1988) 165 CLR 360.

8 *Williams [No 1]* (2012) 248 CLR 156, 202 [56].

decision in *Toy v Musgrove*[9] to assist with arriving at an understanding of the place of the prerogative within the Australian constitutional framework, and the prerogative's consequential affirmation in the constitutional text, through the use of the words in s 64 of "and shall be the Queen's Ministers of State for the Commonwealth". Third, having made the argument that the prerogative is a creature of the Crown, recognised by the common law, and textually affirmed as part of the constitutional law of Australia through the preamble and ss 2, 44(iv), 64 and 74, the dissertation then reflects upon what this fundamental assumption means for the scope or nature of the executive power (particularly the non-statutory executive power) of the Commonwealth, understood in a functionalist sense, and in contradistinction to the prerogative.

The dissertation advances a theorem that, when English constitutional history and practice is examined, the prerogative is best understood as a *bundle of qualities or attributes* that have emerged around the Sovereign's title, and are recognised by the common law – that is, they are given effect by the common law, but they are attributes of the Crown which doctrinally predate the emergence of the common law. Those qualities or attributes manifest themselves as rights, capacities, immunities and preferences. In the context of a written constitution which distributes the roles of making, executing and interpreting the laws to three separate and distinct constitutional organs, those qualities are able to be legislated with respect to, executed or administered by, and interpreted by, the legislature, the executive and the judiciary respectively.

In terms of the executive power of the Commonwealth, the theorem is that the executive government is charged with the "execution and maintenance" of those rights, capacities, immunities and preferences. Those rights, preferences and capacities do not *spring from* the executive power, but the executive power is the constitutional authority to administratively give effect to those qualities of the Crown recognised by the common law – just as the legislative power is the constitutional authority to legislate with respect to

9 (1888) 14 VLR 349.

those qualities, and similarly, the judicial power is the constitutional authority to interpret and adjudicate between subject and subject, or subject and Crown, as to common law rights, preferences and capacities of the Crown. In this, it is argued that a proper understanding of non-statutory executive power necessitates a clear, and historically-sound, understanding of the place of the prerogative in British constitutional history; and how the prerogative was received in the Australian constitutional landscape.

The importance of this dissertation stems from four sources. First, its topicality. Such is the nature of current emphasis in constitutional litigation that the relationship between the prerogatives of the Crown and the executive power is becoming a much fought-upon battlefield. Second, the High Court has displayed, in *Pape*, and particularly in *Williams [No 1]*, an enthusiasm to consider (or reconsider) the fundamental assumptions about the nature of the executive power. Third, and perhaps the most important reason: the current state of executive power jurisprudence is that the non-statutory executive power is to be understood as a constitutional authority which is part functionalist authority, understood in some vague "nationhood" sense, and part successor to the British prerogative. As French CJ said: "The history of the prerogative powers in the United Kingdom *informs* consideration of the content of s 61, but should not be regarded as determinative".[10] The disentangling of the prerogative from the executive power of the Commonwealth is important as it potentially has significant ramifications for any description of the non-statutory executive power. Understanding the nature of the recognition of the prerogative in the constitutional text is basal to understanding the non-statutory executive power; and therefore the scope of the Commonwealth to utilise the non-statutory executive power. And fourth, a correct understanding of the nature of the prerogative and its relationship to executive power (in British constitutional practice) is necessary for better understanding the prerogative in right of each of the States of the Commonwealth.

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10 *CPCF* (2015) 255 CLR 514, 538 [42] (emphasis added).

A Note on the Text

Throughout this dissertation, the author has chosen to modernise the spelling of language which is arcane or obscure. Where the language is rendered in American English, the author has also chosen to change the spelling to modern Australian English.

Whenever in this dissertation text is presented as a quotation, footnotes that appear within that quotation (if any) are taken verbatim from the original source. If footnotes that appear within quotations have been retained, the text of the footnote is retained as is from the original source. If footnotes that appear within quotations have been omitted, that is identified in the reference for the quotation.

The glossary sets out the meaning of the terms used throughout this dissertation. The case law and legislation identified in this work was current as at 22 March 2017.

CHAPTER ONE

INTRODUCTION

I THE PURPOSE

William Shakespeare described the English Realm as "this scept'red isle".[1] This description of the Kingdom as being "scept'red" imputes a divine quality to the English Crown; the sceptre being a regal ornament, belonging to the Sovereign, and representing divine royal authority. In this elegant description of the English Crown, written in the closing years of the Elizabethan Age, the Bard was describing the quality of the Sovereign's title at the end of the reign of the House of Plantagenet. The origin of royal authority has always been attributed to Divine Providence.[2] We see manifestations of this divine quality not just in high literature, but also in art; in the Wilton Diptych there is an unmistakable demonstration of Richard II's "literal belief in his anointed divinity".[3]

The power and authority at any given time of the English Throne (subsequently described as the British Crown), is nothing more than a static description of the evolving quality of the princely title. The Crown is what one historian described as "the frame of law, ritual and memory".[4] To describe the Sovereign's quality is to describe the Sovereign's power and authority. And any description of the Sovereign's qualities is not susceptible to a pure analytical assessment; it is, by necessity, adjectival. What the

1 W Shakespeare, *King Richard II*, Act II, Scene I.

2 R Tombs, *The English and Their History*, 99.

3 D Jones, *The Plantagenets, The Kings Who Made England*, 559.

4 M Rubin, *The Hollow Crown, A History of Britain in the late Middle Ages*, 321.

Sovereign's quality is, and what he or she has tended to become, is the only sure way to describe the quality of the English Crown.

From the time of the reign of Richard II, the kings of England have consistently appropriated the title of "majesty".[5] To offend against the king was to offend against "the king's majesty". The word "majesty" derives from the Latin *majestas*, meaning greatness or grandeur,[6] and speaks to the quality of the occupant of the throne, and their princely title. To offend against the Sovereign's majesty was, and is, to offend against the Sovereign's greatness and grandeur; it is to offend against the quality of the Sovereign's title. The Sovereign's title is measured in the language of the Sovereign's "prerogative", the "royal prerogative", or "the prerogatives of the Crown". The prerogative is nothing more than the manifestation of the historically-evolved description, quality, or nature of the Sovereign's regnal title. That evolved description has, with the passage of centuries of English history, manifested itself in the form of rights, capacities, responsibilities, immunities and authorities that inhere in the king or queen regnant's title. For example, the quality (or maxim) that the king can do no wrong extended into Crown immunity against suit. Similarly, the description of the king or queen as the fountain of honour extended into the Crown's common law authority to bestow civil and military honours.

An understanding of the quality of the English Crown (and therefore, the Australian Crown) is, by necessity, a study of its history. The nature of the kingly office must be studied for what it was, to understand what it became. It is only through an historical analysis that the nature of the prerogative is properly elucidated; culminating in what might be described as the qualitative veneer of the Sovereign's princely title.

This dissertation is a study of the relationship between the prerogatives of Kings and Queens of England (as that prerogative has been received into Australian constitutional law), and the executive power of the Commonwealth, being the textually-expressed constitutional authority found in Chapter II of the Australian Constitution.

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5 N Saul, *The Three Richards; Richard I, Richard II, and Richard III*, 60.

6 *The Australian Concise Oxford Dictionary* (Fourth Edition), 847.

This dissertation is not a general treatise on the prerogative, in the sense that either H V Evatt's doctoral thesis[7] was; or Joseph Chitty's taxonomy of the prerogatives[8] was. Rather, this dissertation is more akin to George Winterton's doctoral thesis.[9] That is, it is argumentative in nature. Nor does this dissertation attempt to provide a comprehensive theory of the content of prerogative, or the content of the executive power or the Commonwealth. Therefore, the scope of the executive power of the Commonwealth is not either comprehensively or conclusively set out, nor are the various sub-species of the prerogative's rights, capacities, preferences or immunities.

This dissertation attempts to achieve is four things. First, it describes the nature of both the prerogative and the executive power of the Commonwealth. Second, it makes the argument that the prerogative and the executive power are two different constitutional species, and examines their relationship in contradistinction to one another. Third, it considers in detail how the prerogative is textually recognised or affirmed within the text of the Australian Constitution. And fourth, by necessity, having identified the nature of the prerogative, and presented a theorem (in this thesis, described as the "core argument") about how the prerogative is textually recognised or affirmed in the Constitution, the dissertation then proceeds to reflect upon the nature of the executive power of the Commonwealth if it is to be understood as not, of itself, affirming or recognising (or in the words of Gummow, Crennan and Bell JJ, "import[ing]")[10] the prerogatives of the Crown – but as the constitutional authority provided to execute, maintain, or give administrative effect to the prerogative.

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7 H V Evatt, *Certain Aspects of the Royal Prerogative, A Study in Constitutional Law* – a thesis submitted for the award of Doctor of Laws at the University of Sydney in 1924, and published as *The Royal Prerogative* in 1987.

8 J Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights* published in 1820.

9 G G Winterton, *Parliament, the Executive and the Governor-General* – a thesis submitted for the award of Doctor of Juridical Science at Columbia University, published by Melbourne University Press in 1983.

10 *Pape* (2009) 238 CLR 1, 83 [215].

In correctly understanding the nature of the prerogative, and by having regard to the executive power as it was understood as an aspect of the common law in the colonial setting, and, having regard to the way in which the prerogative is textually recognised or affirmed in the constitutional text, it is then possible to posit a general theory as to the nature of the executive power of the Commonwealth. It is through the de-coupling of these two concepts that this dissertation is able to sketch out a functionalist understanding of the executive power of the Commonwealth.

By necessity, the dissertation requires a close and detailed examination of the key portions of the Debates of the Federation Conventions in 1891 and 1897-98, so as to make an assessment about the quantity and quality (or comprehensiveness) of the consideration by the framers of the key issues central to this thesis. This requires a recitation of the actual words used by the delegates at the critical points in the in-committee phase of the Conventions in a fashion that is more laborious than one might ordinarily find in a judge's reasons for judgment. This is necessary for two reasons. It illustrates the depth of either analysis or understanding of constitutional principle by the delegates. It also illustrates the nuanced way in which the delegates sought to achieve their constitutional choices through the crafting of carefully chosen text.

A particular difficulty associated with considering the nature of the prerogative is that there are precious few cases – both in the United Kingdom and Australia – that expressly consider or concern the nature of the prerogative. In fact, as Brigid Hadfield pointed out "no case on the prerogative came before the House of Lords after the seventeenth century Revolution Settlement until the immediate aftermath of the First World War".[11] Since then

11 B Hadfield, "Constitutional Law", L Blom-Cooper, et al, *The Judicial House of Lords, 1876-2009*, 504. There have, of course, been a number of other decisions that concern the prerogative in the Privy Council in respect of colonial matters, or in inferior courts like the High Court of Justice.

(and including the Supreme Court of the United Kingdom), the recent *Brexit case* aside,[12] there have been only seven such British cases in the House of Lords.[13]

In Australia, the situation is a little better. The theorem articulated in this dissertation has benefited from the effluxion of time. Since the research was commenced in 2010, the High Court of Australia has decided five important cases that significantly illuminate the moorings of the executive power of the Commonwealth (and, by implication, the prerogative) – making it clear that the members of the Court construe the executive power in what has come to be described as "the inherent view".[14] *Pape v Commissioner of Taxation,*[15] *Williams v Commonwealth [No 1]*,[16] *Williams v Commonwealth [No 2]*,[17] *CPCF v Minister for Immigration and Border Protection,*[18] and *Plaintiff M68/2015 v Minister for Immigration and Border Protection*[19] have greatly added, as will be seen in Chapter 3, to the jurisprudence in respect of construing the executive power of the Commonwealth in a functionalist sense. As will be seen in Chapters 3 and 5, the emergence of the inherent view in the High Court's jurisprudence has been incorporated into one of the key assertions advanced in this work – that the constitutional text provides for both a common law understanding of the prerogative and a functionalist (or inherent)

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12 *Secretary of State for Exiting the European Union v R (on the application of Miller and Anor)* [2017] UKSC 5, which was an appeal from *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2016] EWHC 2768.

13 *Attorney General v De Keyser's Royal Hotel* [1920] AC 508; *Re a Petition of Right* [1915] 3 KB 649; *Burmah Oil Co Ltd v The Lord Advocate* [1965] AC 75; *Attorney-General v Nissan* [1970] AC 179; *R v Secretary of State for the Home Department*; *ex parte Fire Brigades Union* [1995] 2 AC 513; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (the *GCHQ case*), and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [No 2]* [2009] 1 AC 453. There have, of course, been a number of other cases (and not in the House of Lords), but in the Privy Council in relation to the dominions, like *Bonanza Creek Gold Mining Company Ltd v The King* (1916) AC 566 which was an important prerogative case heard by the Board.

14 The inherent view and the common law view are set out in Chapter 5.

15 (2009) 238 CLR 1.

16 (2012) 248 CLR 156.

17 (2014) 252 CLR 416.

18 (2015) 255 CLR 514.

19 (2016) 257 CLR 42.

view of the executive power of the Commonwealth – both of which operate side-by-side to one another, and correlatively to each other.

The overarching thematic of this work is to advocate for the importance (in line with the High Court's more recent constitutional cases) of constitutional interpretation to be based upon the text, structure and history of the Constitution, and in doing so, giving due regard to authorial intention where such intention can be clearly and properly identified. It does this by relying upon what Professor Jeffrey Goldsworthy described as "moderate originalism".[20] That is, using "original meanings" and "original intentions", as revealed in the Debates, to aid in the construction of the constitutional text.

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The constitutional balance between the political strength of the executive and the legislature is not confined to the discipline of political science. It is also a feature of constitutional law; and concerns those who study and practise statecraft. What the prince (or, in modern constitutional usage, "the executive government") may do without the express approval of the legislature is a particularly relevant and contemporary topic of constitutional scholarship in most democracies.

The election of the Whitlam government in 1972, and the decisions of that administration, saw the constitutional issue as to what formed part of the prerogative or the executive power of the Commonwealth being agitated in the High Court of Australia.[21]

Since then, the law in relation to the prerogative in right of the Commonwealth, and the executive power of the Commonwealth, has been periodically litigated in Australia's Federal Supreme Court. In more recent times, the initiatives of the Howard, Rudd and Abbott governments have led to an increase in litigation which centres upon, or necessarily

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20 J Goldsworthy, "Originalism in Constitutional Interpretation", (1997) 25 *Federal Law Review* 1.

21 *Barton v Commonwealth* (1974) 131 CLR 477; *Victoria v Commonwealth and Hayden* (the *AAP Case*) (1975) 134 CLR 338; *Johnson v Kent* (1975) 132 CLR 164.

turns upon, the doctrinal limitations of the prerogative, or the Commonwealth's executive power. The Howard government's actions to control the unauthorised entry into Australia of non-citizens,[22] and the introduction of Commonwealth funding of programmes which rely entirely upon ministerial guidelines,[23] have both been the cause of high profile constitutional litigation. The Rudd government's initiatives to stimulate the national economy during a significant period of global economic downturn has also been the catalyst for litigation in relation to the executive power.[24] So too has the Abbott government's initiatives to facilitate the offshore detention of refugee claimants in Nauru.[25]

Coupled with this increase in frequency in which executive power cases are being litigated in the High Court, there is also the temptation (in a political environment where the executive government has great difficulty obtaining Senate approval of controversial legislation) for the ministry of the day to explore the scope of the executive power of the Commonwealth in order to achieve seemingly unattainable legislative objectives.

II THE IMPUGNED ORTHODOXY

This dissertation contests the orthodox jurisprudence of the High Court of Australia that the prerogatives of the Crown are textually sourced from, or are incorporated in, the words of s 61 of the Constitution and, therefore, the meaning of and the source of the prerogative in the Australian context, emanates from the words of s 61 of the Constitution.

The orthodox position is explained in more detail later,[26] but can be summarised this way. Originally commencing with Williams J saying that the executive power of the

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22 *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452 (North J); *Ruddock v Vadarlis* (2001) 110 FCR 491 (Black CJ, Beaumont and French JJ); *Vadarlis v Minister for Immigration and Multicultural Affairs* [2001] HCATrans 625.

23 *Williams [No 1]* (2012) 248 CLR 156; *Williams [No 2]* (2014) 252 CLR 416.

24 *Pape* (2009) 238 CLR 1.

25 *Plaintiff M68* (2016) 257 CLR 42.

26 See Chapter 5.

Commonwealth "included such of the then existing prerogative powers of the King in England",[27] the typical starting point for the orthodox view is the words of Mason J in *Barton v Commonwealth* where his Honour opined that s 61 "includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law".[28]

More recently, French CJ in *Pape* said that the prerogatives of the Crown "form part of but do not complete, the executive power" of the Constitution.[29] The Chief Justice affirmed this view in *Cadia Holdings v New South Wales*, where he said that the:[30]

> Prerogative powers and rights enjoyed by the Crown in the colonies before Federation may be seen as informing, or forming part of, the content of the executive powers of the Commonwealth and the States according to their proper functions.

Gummow, Heydon, Hayne and Crennan JJ also expressed the view in *Cadia* that s 61 of the Constitution "includes the prerogative powers accorded the Crown by the common law".[31] In *Kline v Official Secretary to the Governor-General*, four members of the High Court viewed the prerogatives of the Crown as "now encompassed in the executive power conferred by s 61".[32]

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27 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 231.

28 *Barton v Commonwealth* (1974) 131 CLR 477, 498. French CJ approvingly quotes this passage in *Pape* (2009) 238 CLR 1, 61 [130]; French CJ also approvingly quotes in *Pape* the words of Mason CJ, Deane and Gaudron JJ in *Davis v The Commonwealth* (1988) 166 CLR 79, 93, where their Honours said: "... s 61 confers on the Commonwealth all the prerogative powers of the Crown except those that are necessarily exercisable by the States under the allocation of responsibilities made by the Constitution and those denied by the Constitution itself", at 62 [131].

29 *Pape* (2009) 238 CLR 1, 60 [126] and [127].

30 (2010) 242 CLR 195, 210 [30] and [31].

31 (2010) 242 CLR 195, 226 [86] (footnotes omitted), and approvingly quoted by Gummow and Bell JJ in *Williams [No 1]* (2012) 248 CLR 156, 227 [123].

32 (2013) 249 CLR 645, 636 (French CJ, Crennan, Kiefel and Bell JJ).

There is a slight difference in the views of the justices as to which particular phrase in s 61 "incorporates" or "imports" the prerogative. Gummow, Crennan and Bell JJ said in *Pape* that:[33]

> … the phrase "maintenance of this Constitution" in s 61 imports more than a species of what is identified as "the prerogative" in constitutional theory. It conveys the idea of the protection of the body politic or nation of Australia.

Whereas, in contrast, according to French CJ in *Williams [No 1]*:[34]

> The mechanism for the incorporation of the prerogative into the executive power is found in the opening words of s 61 which vests the executive power of the Commonwealth in "the Queen". This has been described as a "shorthand prescription, or formula, for incorporating the prerogative – which is implicit in the legal concept of "the Queen" – in the Crown in right of the Commonwealth".

This orthodox view paraphrases the commentary of the leading modern scholar of Chapter II of the Constitution, the late Professor George Winterton. In his *The Parliament, the Executive and the Governor-General*, Winterton concludes that "the vesting of the executive power of the Commonwealth in the Queen has had the effect of including, within the executive power of the Commonwealth … all of the prerogatives relevant to the Commonwealth's sphere of activity".[35] He said, more explicitly:[36]

> The prerogative is incorporated in s. 61 of the Constitution by virtue of its

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33 *Pape* (2009) 238 CLR 1, 83 [215].

34 *Williams [No 1]* (2012) 248 CLR 156, 185 [23] (footnotes omitted).

35 G G Winterton, *The Parliament, the Executive and the Governor-General*, 27; see also 23-24.

36 G G Winterton, *The Parliament, the Executive and the Governor-General*, 50, 51.

> having vested 'the executive power of the Commonwealth' in 'the Queen.' When seen against the British constitutional background, the vesting of executive power of the Crown was, in effect, a shorthand prescription, or formula, for incorporating the prerogative – which is implicit in the legal concept of 'the Queen' – in the Crown in right of the Commonwealth.

Two aspects of this orthodox view are challenged. First, the assertion that the textual incorporation, or inclusion, of the executive power implicitly "incorporates", or "imports" the prerogative is contested. Second, the theorem that within British constitutional history or practice, the *mere* replication of the executive function of government (manifested, or expressed as "the executive power") carries with it the prerogatives of the Crown, is also contested.

In respect of the second aspect of the orthodox view, this author takes issue with the assumption, evident in the statements of principle by French CJ and Professor Winterton *supra*, that the prerogative is a species of, or part thereof, the executive power – therefore (according to that assumption) where goes the executive power of the Crown, so goes the prerogative. This assumption is misconceived. It is premised on a misunderstanding of both the nature and history of the prerogatives of the Crown and of the executive power of the Crown, and their relationship to one another. French CJ's expression that the "*content*" of the executive power "extend[s] to" the prerogative powers is conceptually incorrect.[37]

These two aspects are challenged because they lead to the view that the prerogative and the executive power are conflated as one species of constitutional authority. This has resulted in the emergence of the non-statutory executive power, construed as a constitutional authority vested in the executive government, which permits executive action, as an ill-defined species of executive power – being a blend between the British prerogative and an emerging inherent authority. The definitional or descriptive limits of

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37 *CPCF* (2015) 255 CLR 514, 538 [42].

this Australian executive power is detached from its common law origins, and defies easy reconciliation with a textual and structural description in terms of the depth of the power.

In challenging the two aspects, the author has attempted to set out some first principles of the Australian Constitution, and then set out how those first principles impact upon the construction of the key provisions of the Australian Constitution.

III THE CORE ARGUMENT INTRODUCED

The role of the Crown in the Australian Constitution has become unfashionable of late.[38] In contrast, the traditional view is that the Crown pervades the Constitution.[39] The Constitution was drafted by its framers against the backdrop of the law, practice and conventions of the British Crown. The Hon Michael McHugh has described the Crown as "a chameleon-like institution that has protected itself by remaining in the background".[40] The Crown's powers and functions which are recognised by the common law are part of the pre-existing jurisprudence that forms the backdrop against which the framers of the Australian Federation established the Commonwealth of Australia. The Constitution evinces this.

The preamble of the *Commonwealth of Australia Constitution Act 1900* (Imp) proclaims that "[w]hereas the people" of the original states had "agreed to unite in one indissoluble Federal Commonwealth *under the Crown* of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established".[41] The constitutional text – from the very first sentence – commands the reader to conclude that the Federal Commonwealth is established "under the Crown … *and* under the Constitution hereby

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38 C Saunders, "The Concept of the Crown", (2015) *Melbourne University Law Review*, Vol 38, 873; N Condylis, "Debating the Nature and Ambit of the Commonwealth's Non-Statutory Executive Power", (2016) *Melbourne University Law Review*, Vol 39, 385, 409.

39 L Zines, *The High Court and the Constitution*, 339; and affirmed in the Sixth Edition (published as *Zine's The High Court and the Constitution*, and authored by Professor James Stellios), 368; J Quick, R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 294.

40 M McHugh in A Twomey, *The Chameleon Crown, The Queen and Her Australian Governors*, v.

41 Emphasis added.

established".[42] The polity created is expressly a creature of the Crown and of the constitutional text. It is this duality of the Constitution's doctrinal heritage that is of basal significance.

There is nothing new in recognising the importance of the antecedent common law to constitutional interpretation. Sir Owen Dixon said in 1957 that:[43]

> In Australia we have paid but little attention to a distinction, which appears to me to be fundamental, between American constitutional theory and our own. It concerns the existence of an anterior law providing the sources of juristic authority for our institutions when they came into being … In Australia we begin with the common law … the foundation of its authority to do so was the pervasive common law.

The rights and powers of the Crown are, in English constitutional jurisprudence, in part, rights and powers recognised by the common law. Whilst it is possible to debate whether those rights and powers are *part of* the common law; they are certainly *recognised by* the common law.

It is against this backdrop that this dissertation advances the contention that the common law powers of the Crown still, despite the enactment of the Constitution, obtain their force by reason of the antecedent common law, and the prerogatives of the Crown are not textually sourced in s 61 of the Constitution; rather, the constitutional text expressly affirms the continuing operation of the prerogatives of the Crown. French J's statement (when his Honour was a puisne judge of the Federal Court) that: "The executive power of

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42 Emphasis added.

43 O Dixon, "The Common Law as an Ultimate Constitutional Foundation", *Jesting Pilate*, 203; see also 198-202.

the Commonwealth under s 61 cannot be treated as a species of the royal prerogative",[44] is challenged.

This dissertation advances the following propositions. First, the Constitution was enacted against the background of the common law. Second, as already mentioned, the law of the Crown is antecedent to the Constitution. Third, the prerogatives of the Crown are a set of rights, preferences, immunities and capacities which are wider than the species sometimes described as "executive prerogatives". Fourth, the executive power of the Commonwealth was not intended to be the textual source, or affirmation, of the vesting in the Commonwealth Crown of the prerogatives of the Crown. Fifth, s 64 of the Constitution provides that the ministers "shall be the Queen's Ministers of State for the Commonwealth", and it is this provision that was intended to *affirm* that the Commonwealth ministry has the prerogative powers that the Imperial ministry had in respect of the new Commonwealth, as appropriate to Australia's conditions. Sixth, the executive power of the Commonwealth, not being the textual source of the prerogatives of the Crown, ought to be construed in a functionalist sense, in contradistinction to the legislative and judicial powers of the Commonwealth. In advancing these propositions, the orthodox understanding of the relationship between the prerogative and the executive power is challenged – the statement that "the prerogative is *an* executive power",[45] is contested. In sum, the reader is asked to conclude that the rights, preferences, immunities and capacities of the Crown recognised by the common law, are textually affirmed by the language of the preamble, and ss 2, 64 and 74 of the Constitution.

This dissertation attempts to support the third, fourth and fifth contentions by way of historical analysis, and the interpretive power of a detailed examination of the Debates to ascertain the framers' objects and purpose behind their textual choices for the Constitution.

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44 *Ruddock v Vadarlis* (2001) 110 FCR 491, 540 [183] (French J).

45 A Twomey, "Pushing the Boundaries of Executive Power – *Pape*, the Prerogative and Nationhood Powers", (2010) 34 *Melbourne University Law Review*, 313, 325 (emphasis added).

This argument is described in this dissertation as the "core argument". It is set out in full in Chapter 5. As a by-product of the core argument, it is possible to embark upon the task of describing the executive power of the Commonwealth, particularly the non-statutory executive power, which is a by-product of the disentangling of the concepts of the prerogative and the executive power of the Commonwealth.

IV THE USE OF THE WORD "PREROGATIVE"

The words "prerogative", "prerogatives", "royal prerogative" and "prerogatives of the Crown" are interchangeably used to refer to that body of rights, preferences, capacities and immunities that the common law of England (and then the common law *in Australia*)[46] came to recognise, in the course of history and practice, that the reigning Sovereign[47] (be it the King or Queen regnant) of the United Kingdom of Great Britain and Northern Ireland (and now, Australia)[48] was, or is, invested with.

It is necessary to distinguish the "prerogative" or "royal prerogative", as those words are used in this dissertation, from the concept, also called the "prerogative", used by John Locke in his *Second Treatise of Civil Government*, first published in 1689. Locke wrote of the need for the executive to have a discretionary power for the public good. He wrote:[49]

> This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative: for since in some governments the lawmaking power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution; and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make

46 *Judiciary Act 1903* (Cth), s 80.

47 That is, reigning pursuant to the provisions of the *Act of Settlement 1701* (Imp), and being a descendant of the most Excellent Princess Sophia Electress and Duchess Dowager of Hannover.

48 *Sue v Hill* (1999) 199 CLR 462, 489-490 [56] and [57] (Gleeson CJ, Gummow and Hayne JJ).

49 J Locke, *Second Treatise of Civil Government*, § 160.

> such laws as will do no harm, if they are executed with an inflexible rigour, on all occasions, and upon all persons that may come in their way; therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe.

Whilst the prerogative in the British sense contains elements, or aspects, of Locke's prerogative, Locke and others use the word "prerogative" in a sense which does not accord with the sense in which it is used in this dissertation. In short, Locke's prerogative includes a dimension of extra-legality, or extra-constitutionality. That is, the power described is a power which is asserted to be reposed in the executive which is necessary for the public good, and is able to be exercised extra-legally in the sense that the constitution of the state does not accommodate the power.

In the British sense, the prerogative is, and always has been, a discretionary power recognised by the British Constitution (in the ancient sense), and is recognised as being *lawfully within power*. The word "prerogative" refers (incorrectly says this author) to "a specific *type of* executive power, exercised in Britain in the name of the Crown and not requiring parliamentary consent".[50]

Nonetheless, it is important to be aware in constitutional scholarship that there is a sense in which "prerogative" is used that does not accord with the sense in which the word (and the body of doctrine associated with that word) has come to be used in describing a centuries-old feature of British constitutional practice.

In Chapter 2, the conceptual origin and general nature of the prerogative of the Crown is discussed and contrasted against the executive *function* of government. In Chapter 5, in setting out the core argument about how the prerogative is textually recognised, or affirmed, the relationship between the prerogative and the executive power of the Commonwealth becomes clearer.

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50 T M Poole, *Reason of State; Law, Prerogative and Empire*, 6 (emphasis added).

V THE USE OF THE WORDS "EXECUTIVE POWER"

Accuracy demands an appreciation of the different senses in which the expression "executive power" is used in speech, legal and political theory and in general scholarship. There is a danger in the unnuanced use of the words "executive power". That danger arises because of the multiple uses (or the plasticity) of those words. It is the plasticity of the expression "executive power" which allows the author to offer an argument about how the preferred sense of the term should be understood and applied. The expression "executive power" can be observed in British constitutional and colonial literature to be used in *at least* the following three senses.

First, the words can be used in a functionalist, or Montesquieuian sense. That is, the executive power is that power which belongs to any sovereign power, and is typically vested in a separate arm or branch of government, which administers, enforces, or completes the laws of the state. In this sense, the meaning of "executive" very closely resembles that of "administrative". In this sense, "executive power" is a product of the historical forces that saw light after the English Civil War. In Chapter 2 the history of the emergence of a recognised *executive function* of government is outlined.

The best example of executive power in this sense is demonstrated by Article II of the *United States Constitution*: the "executive Power" of the United States is vested in the President of the United States. The power of the President is to administer and enforce the laws of the United States. The scope of the President's executive power is deduced from the laws that the President is required to administer.[51]

In the Montesquieuian sense, the power is best described rather than defined. And it is best described, or understood *in contradistinction* to the legislative and judicial powers. The legislative power being the power to enact laws in respect of the subject and state; the judicial power being the power to quell controversies between the state and subject, or between a subject of the state and another subject, according to law.

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51 *Youngstown Sheet & Tube Co v Sawyer*, 343 U.S. 579 (1952) (Jackson J).

Second, "executive power" is used to denote in British constitutional history those powers that the king has which are said to be the "executive part of government". These powers do not necessarily accord with any functionalist understanding of their purpose – rather, they are powers or activities which are carried out by the king or the magistrate, rather than by the parliament. The identification of these functions is best understood through the prism of history. The meaning of the words "executive power" in this sense accords with Adam Tomkins' theory of "Crown vs Parliament" which is canvassed in Chapter 2, and which bundles together what would otherwise be a concept called judicial powers and functions (and some legislative ones as well) in the functionalist or Montesquieuian sense.

Third, the words "executive power" are sometimes used in a very loose and grandiloquent sense. That is, the use of the word "executive" in "executive power" is an intensifier and ennobling word or a word of amplification. Similar to the use of the word "executive" in the titles "executive chef", "executive secretary" or "executive officer". The word "executive" in this sense does not denote a functionalist meaning; rather, it denotes seniority, standing or prestige. In this sense, Blackstone's description of the king as "the supreme executive power of the English nation", might be understood as a grandiose way of describing the king's supreme power.[52] So too can Joseph Chitty's description of the king as the "executive magistrate".[53] Much difficulty and confusion arises from the plasticity in the use of the word "executive" in constitutional jurisprudence.

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Blackstone defined the prerogative as "the special pre-eminence, which the King has, over and above all other persons, and out of the ordinary course of the common law, in right of

52 W Blackstone, *Commentaries*, Bk I, 183.

53 J Chitty, *Prerogatives of the Crown*, 6.

his royal dignity".[54] He divided the prerogative into *direct* or *incidental* prerogatives. The *direct* prerogatives are such parts of the royal character and authority as are rooted in and spring from the King's political person. The *incidental* prerogatives "bear always a relation to something else distinct from the King's person".[55] Blackstone divided the direct prerogatives into "three kinds", namely "The King's royal character; his royal authority; and his royal income".

After describing the aspects of the King's royal character, Blackstone described the royal authority as "those branches of the royal prerogative, which invest this our sovereign lord ... with a number of authorities and powers; in the execution whereof consists the executive part of government".[56] For as much as Blackstone commences his chapter concerning the King's title with the declaration that: "The supreme executive power of these Kingdoms is vested by our laws in a single person, the King or Queen",[57] a close and global reading of Blackstone's *Commentaries* makes it plain that the prerogative is to be understood as a bundle of characteristics, powers, rights and preferences, attributable to the King – the executive part of government being a species of royal authority. Blackstone makes this clear when introducing his chapter on the King's revenue, when he said:[58]

> Having, in the preceding chapter, considered at large those branches of the King's prerogative, which contribute to his royal dignity, and constitute the executive power of the government, we proceed now to examine the King's "fiscal prerogatives, or such as regard his revenue ..."

54 W Blackstone, *Commentaries*, Bk I, 232.
55 Ibid.
56 Ibid 242.
57 Ibid 183.
58 Ibid 271.

As "supreme executive magistrate", Blackstone said, "the King possesses, subject to the law of the land, exclusive, deliberate, and more decided, more extensive and more discretionary rights and powers".[59] He then took "a view of [the King's] principal and transcendent prerogatives as executive magistrate".[60] In this sense, caution should be taken when observing Blackstone's use of the word "executive" in his declaration that the "supreme executive magistrate" in the kingdom is the king or queen. Apparently, Blackstone:[61]

> … was ever the poet, attentive to the plasticity of words, long after his career as a published poet ended. Much seeming contradiction begins to fade if we read Blackstone with this in mind.

The same caution applies in United States' constitutional scholarship. The fact that "supreme executive authority" and "executive magistrate" were used by authors of United States' constitutional texts[62] prior to Australian Federation to describe the presidential power – a power that did not, as is explained in detail in Chapter 6, inhere the royal prerogatives of the British Crown – demonstrates that those expressions (and their use of the word "executive") ought not automatically lead to the conclusion that what is being described is an office or power which includes the prerogatives of the Crown.

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The use of the word "executive" in the context of a part, or function, of government is also problematic for a historical reason. The Montesquieuian division of legislative, executive and judicial functions of government did not just appear overnight in English (then British)

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59 J Chitty, *Prerogatives of the Crown*, 3.

60 Ibid 5-6.

61 P D Halliday, "Blackstone's King" in W Prest (ed), *Re-Interpreting Blackstone's Commentaries, A Seminal Text in National and International Contexts*, 170.

62 A de Chambrun, *The Executive Power in the United States*, xvi, xi, and xii.

or North American colonial governments. Nor does the Montesquieuian trinity accurately describe the nature of English, or colonial governments, at the time of the publication of the *Spirit of the Laws*. After all, Lord Mansfield (then the sitting Chief Justice of the King's Bench) was a member of Lord North's Cabinet until 1782,[63] although this was the subject of some criticism.[64] What has become regarded as the judicial function or power of government was, until well into the nineteenth-century, considered part of the executive function. As the pre-eminent historian of the creation of the American Republic, Gordon Wood, has written:[65]

> In the colonial period judges had been regarded essentially as appendages or extensions of royal authority embodied in the governors; they were lesser magistrates tied to the governors or chief magistrates. Consequently many colonists concluded that there were really "no more than two powers in any government, viz. the power to make laws, and the power to execute them; for the judicial power is only a branch of the executive, the chief of every country being the first magistrate." Even John Adams in 1766 regarded "the first grand division of constitutional powers" as "those of legislation and those of execution," with "the administration of justice" resulting in "the executive part of the constitution".

This state of affairs was equally the case in Great Britain during that period.[66] There is more to the expressions "the King's Courts" and "the King's judges" than mere deference

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63 N S Poser, *Lord Mansfield: Justice in the Age of Reason*, 143.

64 Ibid 144 (the *Public Advertiser* commented in December 1777 that "a man clothed with the robe of magistracy ought not to be a politician; a political judge was an improper and dangerous engine").

65 G S Wood, "Comment" in A Scalia's *A Matter of Interpretation; Federal Courts and the Law*, 54-55 (footnotes omitted).

66 And continued until the early twentieth century: *New South Wales v Commonwealth* (1915) 20 CLR 54, 89 (Isaacs J).

to the Crown. The history of the development of, and purpose for, the prerogative writs demonstrates this.[67]

As an additional caution, the terms "executive magistrate", or "chief executive magistrate" can be found in much of the earlier English and the pre- Revolutionary and early republican American literature.[68] The use of the word "magistrate" almost invariably refers to the king, or in the American context, the President (or the governor of the colony). When contrasting the English kingship with the French kingship in his *Reflections on the Revolution in France*, Edmund Burke referred to the "executive magistracy".[69]

"Magistrate" should not be understood in the modern sense of a junior judicial officer – rather, magistrate is used in a sense that is best described as the person exercising public power, and as described *supra*, that often involves the three Montesquieuian powers. For example, the king might be described as the "magistrate of the nation", whereas his judges may be described as his inferior magistrates. Both perform judicial functions. Again, attention is drawn in Chapter 2 to the point at which the executive power emerged as a separate and distinct function of government – at or around the time of the English Civil War.

Great care needs to be exercised when the expressions "the executive", or "executive", or "executive magistrate" are encountered in the literature. Does it mean the function or power of executing or administering the law? Or does the context suggest the function or power of quelling controversies between subjects or citizens, or between the State and its

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67 H Woolf, et al, *de Smith's Judicial Review*, 858-860. As was said by Brett LJ in *Worthington v Jeffries* (1875) LR 10 CP 379, 381 (and quoting from Bacon's *Abridgment*): "As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a great variety of Courts, hence it hath been the care of the Crown that these Courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed, which issues out of the superior courts of common law to restrain inferior courts. … The object of prohibition in general is the preservation of the right of the King's Crown and Courts, and the ease and quiet of the subject …".

68 For example, James Madison, John Jay and Alexander Hamilton use the phrase "executive magistrate" throughout *The Federalist Papers* – see particularly Federalist No. 67, published on 11 March 1788, and authored by Alexander Hamilton.

69 E Burke, *Reflections on the Revolution in France*, 201.

subjects or citizens? The plasticity of the use of the word "executive", both in the English and American contexts, and both before and after the American Revolution, means that great care and attention needs to be taken in ascertaining which, if any, of the three meanings above is being referred to.

For the avoidance of doubt, unless the context reveals otherwise, throughout this dissertation, the word "executive" is used in its functionalist or Montesquieuian sense – that is, it ought to be understood in contradistinction with the legislative and judicial functions and powers.

VI THE SUBJECT MATTER AND THE BINARY CHOICE

A core assumption relating to the subject-matter of this dissertation was agitated in a 2003 article written by a then judge of the Federal Court of Australia, the late Bradley Selway.[70] Justice Selway's *All At Sea – Constitutional Assumptions and 'The Executive Power of the Commonwealth'*, advocated the necessity for an assumption in constitutional interpretation as to what is meant by the executive power of the Commonwealth. Selway noted the absence of any internal definition of executive power. He posited two possibilities (grounded on two possible assumptions). The choice (he said) was between a construction based on a meaning of executive power which accords with the British Constitution; or a construction based on a meaning of executive power which accords with the United States model. Selway favoured the British model as the preferable assumption.

The core argument suggests that it is not necessary to make such a binary choice between a British and American understanding of executive power – to the operational exclusion of the other model. Instead, the executive power of the Commonwealth should be construed in a functionalist sense, similar to the way the "executive Power of the President of the United States of America" is construed in Article II, section 1 of the *United States Constitution*; that is, a power construed in contradistinction to the legislative

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70 B Selway, "All At Sea - Constitutional Assumptions and 'The Executive Power of the Commonwealth'", (2003) 31 *Federal Law Review* 495.

and judicial powers. But in arriving at this construction of the executive power, this author proposes an alternative vehicle for the recognition and affirmation of the prerogatives of the Crown in the Commonwealth constitutional framework. The core argument posits a construction of the executive power of the Commonwealth and the prerogative that accommodates both a British colonial understanding of the receipt of the prerogative in the Queen's dominions, coupled with a functionalist understanding of the executive power as a power to execute and maintain (or administer) the laws of the Commonwealth, and "this Constitution". It does this by demonstrating how the prerogative is executed or maintained as "an adjunct" to the executive power; that is, the executive power permits the execution of the prerogative rights, preferences, capacities and immunities. In this sense, the executive power is the power to give effect to the rights, preferences, capacities and immunities of the Crown, but is not the source of those rights, preferences, capacities or immunities. In this sense, the binary choice posited by Justice Selway is circumnavigated, and a step forward is made in achieving doctrinal clarity in the construction of the executive power of the Commonwealth.

In one respect, this dissertation takes the executive power of the Commonwealth jurisprudence one step further than where Justice Selway left it. It presents a theory whereby the British and American concepts of the prerogative and the executive power respectively sit side-by-side within the Australian constitutional framework, and operate in a consistent and co-ordinated manner. In this sense, there is no need for a binary choice between the British and American doctrine – the Australian Constitution, as the beneficiary of both constitutional traditions, absorbed not both of Selway's assumptions, but both of Selway's frameworks. More broadly, the idea that the Australian Constitution incorporates both a British understanding of the prerogatives of the Crown, and an American sense of the expression "executive power" runs contrary to the doctrinal gymnastics that has seen several justices of the High Court of Australia seek to reconcile the executive power either within, or around, a traditional British executive power framework.

VII AN IMPORTANT DISTINCTION

Critical to any analysis of the prerogative and the Constitution is an appreciation of three aspects of prerogative jurisprudence which are related, but distinct, and which concern the relationship between the prerogatives and the executive power of the Commonwealth. First, the author considers how the Constitution recognises or affirms the continued operation of the prerogative as part of Australian constitutional law. This is described as the *recognition or affirmation aspect* of the relationship. Second, the author touches upon what discrete prerogatives have been devolved to, or invested in, the executive government of the Commonwealth – that is, how much of the prerogative is statutorily devolved to the Commonwealth from the Crown, or has been invested by the Queen in the governor-general. This is described as the *devolution or investment aspect* of the relationship. Third, having established that some part of the prerogative is devolved or invested in the executive government of the Commonwealth, the author touches upon the mechanism used to exercise that prerogative right, preference, capacity, or immunity. This is described as the *execution aspect* of the relationship. The focus of the author's dissertation is the recognition or affirmation aspect. The core argument relates to the recognition or affirmation aspect. Nonetheless, it is necessary at some points to traverse the devolution or investment aspect, and the execution aspect, in some detail to properly trace the relationship between the prerogative and the executive power. Additionally, examining the second and third aspect helps shine a light on the first aspect. For example, the operation of s 2 of the Constitution is a mechanism for the achievement of the execution aspect, but it also demonstrates why the author says that the prerogatives remain vested in the Crown, and the continued operation of them in the Australian constitutional setting is recognised, or affirmed, by the presence of ss 2, 44, 64 and 74. Alternatively, how the framers saw the devolution or investment aspect operating (as explored in some detail in Chapter 4), by necessity throws light upon how the framers at least tacitly understood the recognition or affirmation aspect operating.

There is a further issue that needs to be flagged. The devolution or investment aspect also has a federalism dimension. That is, has the prerogative attribute been devolved or invested in the Crown in right of the Commonwealth, or the Crown in right of the, or a, State, or both the Commonwealth and the States? For example, does the prerogative right to royal metals (gold and silver) inhere in right of the Crown of the Commonwealth or each State and has it been delegated to the governor of the State to administer? For the purposes of this dissertation it is by and large unnecessary to consider the process by which individual prerogatives became exercisable by the Crown in right of a State (save in the global sense which it is discussed in Chapter 2). It is sufficient to simply acknowledge at this point that there is a dimension to the devolution and investment aspect which necessitates an examination as to whether a particular right, preference, capacity of immunity has devolved or been invested in the Crown in right of the Commonwealth or of the States, and if the later, then how that prerogative attribute is made exercisable within the constitutional machinery of that State.

VIII THOSE WHO HAVE GONE BEFORE

This dissertation is not the first attempt to reconcile the relationship between the executive power of the Commonwealth and the royal prerogative. In addition to the three Federation-period constitutional treatises which served as the foundational commentaries upon the Australian Constitution,[71] there are three recognised works on the relationship between the executive power of the Commonwealth and the prerogative.

The first was by H V Evatt, who submitted his *Certain Aspects of the Royal Prerogative, A Study in Constitutional Law* for his Doctor of Laws thesis at the University of Sydney in 1924.[72] The thesis was published, and therefore made available to a wider

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71 J Quick, R R Garran, *The Annotated Constitution of the Australian Commonwealth*, published in 1901; W Harrison Moore, *The Constitution of the Commonwealth of Australia*, published in 1902; A Inglis Clark, *Studies in Australian Constitutional Law*, published in 1901.

72 Subsequently a justice of the High Court of Australia (1930-40), and later, Chief Justice of New South Wales (1960-62).

audience, in 1987 under the title *The Royal Prerogative*. Some of what Dr Evatt opined in his doctorate dissertation found judicial recognition in his judgment in *Commissioner of Taxation v E O Farley Ltd*[73] – in particular, his scheme for classifying and sorting the rights, powers, preferences and immunities of the Crown into three categories: "executive powers", "certain immunities and preferences" and "proprietary rights".[74]

Dr Evatt's work is outstanding scholarship, but it too sided with the incorrect orthodoxy already outlined *supra*. Dr Evatt's *Royal Prerogative* made an important, and basal, contribution to prerogative jurisprudence. It demonstrated an understanding of the prerogative that is historically-based. That is, the prerogative came to Australia with the British settlers, and the British Crown was invested with the prerogative quite apart from the enactment of any statute by the Imperial Parliament. Dr Evatt wrote:[75]

> The Colonists at once owed allegiance to the King and so his proprietary rights, and the immunities and privileges to which he was by the Prerogative entitled as well as the Prerogatives in the nature of the executive powers were all reasonably applicable to the Colony from the outset.

Evatt correctly pointed out that "the common law is to be regarded as implicit in the Commonwealth Constitution", and that "[n]ecessary implication is as much part of the contents of a document [including the Constitution] as its express statements".[76] But he went on to express a view that "when one comes to consider the terms of Section 61 itself … it is indeed rather questionable whether the Courts will have need to invoke [the doctrine that the common law is implicit in the Commonwealth Constitution]".[77]

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73 (1940) 63 CLR 278, 319.
74 H V Evatt, *The Royal Prerogative*, 29-31.
75 Ibid 140.
76 Ibid.
77 Ibid 177.

In considering the relationship between the prerogative and the Constitution Act, Dr Evatt pointed out that Viscount Haldane LC asked during the Privy Council's hearing of the appeal in the *Engineer's case*:[78]

> Did they [the High Court] consider on the first point a Section which is somewhere in the Commonwealth Act, and which I have always thought requires consideration. In the Canadian Constitution the executive power remains in the Crown, delegated to the Governor General, but in Australia is not all the power of the Crown vested in the Governor General?

Dr Evatt recorded Mr Dixon as replying to the Board:[79]

> That is not so, I submit. The Constitution of Australia is a true Federation, as I think your Lordships observed in the *Colonial Sugar Refining case*. The State Governments retain their autonomy parting only with those subject matters of legislative powers which are vested in the Commonwealth Government for the whole of Australia …

To which Dr Evatt recorded the Lord Chancellor as responding:[80]

> We know that. We follow all that. No doubt the Commonwealth of Australia is a true Federation, and, as you would expect from its being a true Federation, no power is given to the Central Parliament to make laws generally for the peace, order and good government of Australia; it is only given under the enumerated heads. *That is not the difficulty. The difficulty is that under Section 61 it is*

78 Ibid 189.
79 Ibid 190.
80 Ibid (original emphasis).

> *declared* 'The executive power of the Commonwealth *is vested in the Queen and is exercisable by the Governor General as the Queen's representative* and extends to the execution and maintenance of this Constitution and the laws of the Commonwealth'. No doubt that does not take away the power of the Governors of the States as representing the Sovereign within their limits, *but does it not put the Sovereign in the position of having parted, so far as the affairs of the Commonwealth are concerned, with every shadow of act of intervention in their affairs and handing them over, unlike the case of Canada, to the Governor General?*

Without recording Mr Dixon's answer to the Lord Chancellor's question, Dr Evatt expressed his view:[81]

> … that the position here suggested by Viscount Haldane may fairly be accepted now as the true legal view determining the exercise of the King's Prerogative in respect of the Commonwealth of Australia.

It is respectfully suggested that despite correctly appreciating that the unwritten law of the Crown is part of the fabric of the constitutional framework, Dr Evatt nonetheless erred. Dr Evatt failed to properly have regard to the history of the prerogative, and, despite acknowledging it in another context,[82] has failed to de-couple the idea of the prerogative and the executive power of the Crown.

It is argued that Dr Evatt has, in not having regard to those portions of the Debates which are set out Chapter 4, failed to appreciate the nuanced way that the prerogative is thought to have been textually affirmed by the framers, and how the executive power of the

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81 Ibid.

82 Ibid 12.

Commonwealth was not suggested by any framer as including the prerogatives of the Crown.

Additionally, Dr Evatt appears to have erred in his reading of the High Court's decision in *Farey v Burvett*[83] where Dr Evatt said that there were "clear statements by the Court" that s 61 incorporated the prerogative.[84] In *Farey v Burvett*, Isaacs J said:[85]

> … Besides the legislative power, there is the executive authority of the Commonwealth. By sec. 61 of the *Constitution* that is vested in the Sovereign and (subject to sec. 2) is exercisable by the Governor-General as the royal representative, and, says sec. 61, this executive power extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. These provisions carry with them the royal war prerogative, and all that the common law of England includes in that prerogative so far as it is applicable to Australia.

Dr Evatt's appears to have given the final sentence too wide a meaning. Isaacs J commenced this sentence with the words "*These provisions* …", and by that, he was referring to ss 2 and 61 of the Constitution – not just the executive power of the Commonwealth. The better reading of Isaac J's passage, recited above, is that his Honour is saying that the combined operation of those two provisions – sections 2 and 61 – permit that operation of the war prerogative. That is, the individual prerogative right is delegated by operation of s 2 of the Constitution, and then that prerogative is executed and maintained by operation of s 61 of the Constitution.

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83 (1916) 21 CLR 433.

84 H V Evatt, *The Royal Prerogative*, 181. Despite Dr Evatt's involvement as the Minister for External Affairs in the assignment of the war prerogative in 1941, his reliance upon ss 2 and 61 to advise the Sovereign to delegate the war prerogative (some seventeen years after he wrote his thesis) does not, of itself, demonstrate that he had a correct appreciation of constitutional principle at the time he wrote his doctorate dissertation.

85 (1916) 21 CLR 433, 452.

The second work was by Professor George Winterton, lately a Professor of Law at the University of Sydney and before that, New South Wales, who wrote his Doctor of Juridical Science thesis for Columbia University on the topic of the executive power. His doctorate became the core of his subsequent work, *The Parliament, the Executive and the Governor-General*, *A Constitutional Analysis*, which was published as part of an "Australian Federation Series", by Melbourne University Press in 1983. Chief Justice French described Winterton's publication as "a seminal work in the field".[86] Winterton's is a scholarly work. It proposed a framework for considering whether executive action (including prerogative acts) is lawful. Winterton wrote:[87]

> … the limits of the executive power of the Commonwealth must be ascertained relative both to the powers of the States and the powers of the other branches of the federal government. The former component, the 'federalism' aspect, will be referred to as that of 'breadth'; and the latter, the 'separation of powers' aspect, as that of 'depth'. Although these two components of federal executive power have, occasionally, been blurred, the correct approach to ascertaining the validity of challenged Commonwealth executive action is to consider, first, whether the act falls within the breadth of the executive power of the Commonwealth, and only if it does, need one go on to consider whether it also falls within the depth of that power; only if both aspects – breadth and depth – are satisfied, will the action be validly carried out. Although there have been relatively few High Court decisions on s. 61, this model for ascertaining the validity of Commonwealth executive action has weighty authority; it represents the approach recently taken by the High Court in *Johnson v Kent*.

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86 R S French, "The Executive Power", The Inaugural George Winterton Lecture, Sydney Law School, The University of Sydney, 18 February 2010; P Gerangelos, "The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, 'Nationhood' and the Future of the Prerogative", (2012) 12(1) *Oxford University Commonwealth Law Journal* 97, 105.

87 G G Winterton, *The Parliament, the Executive and the Governor-General*, 29-30.

This method of analysing impugned executive action has proved popular with the justices of the High Court. Gageler J said recently:[88]

> Without attempting to define Commonwealth executive power, Professor Winterton usefully drew attention to its dimensions when he distinguished its "breadth" from its "depth": "breadth" referring to the subject-matters with respect to which the Executive Government of the Commonwealth is empowered to act having regard to the constraints of the federal system; "depth" referring to the precise actions which the Executive Government is empowered to undertake in relation to those subject-matters.

A year later, in 1984, former Commonwealth Crown Solicitor, Harold Renfree's *The Executive Power of the Commonwealth of Australia* was published by Legal Books. The publication is less cited in subsequent literature than Winterton's treatise, but Renfree's *Executive Power* is a comprehensive examination of the powers of the executive government, and is particularly useful in considering the construction and operation of s 2 of the Constitution.

A distinct advantage that this author has over the distinguished writers that have written in this area of constitutional jurisprudence previously is that the Debates of the Federation Conventions are now regular, and acceptable, aids in interpreting the Constitution.[89] Reference to what the framers had to say is a regular and acceptable form of constitutional reasoning. Whilst Professor Winterton did consider the contents of the Debates, this author has sought to make it a focus of the argument, so that this dissertation reflects an historical and doctrinal approach to the understanding of the prerogative, and the executive power of

88 *Plaintiff M68* (2016) 257 CLR 42, 96 [130].

89 See Chapter 4.

the Commonwealth. This is reflected through the depth of consideration of the *Official Reports* and *Official Records* of the Conventions in Chapter 4.

IX THE CHAPTERS OUTLINED

This introduction identifies the dissertation's entire argument. That said, the detail of the argument in terms of the third, fourth and fifth contentions requires a depth of analysis which cannot be conveyed in one chapter. Chapters 2, 3 and 4 descend into the detail of the history necessary for the making of the core argument in Chapter 5.

Chapter 2 identifies the origin of scholarly inquiry of the attributes of sovereignty; it then identifies the origin of the prerogative in English and colonial constitutional law and practice by positing a theory – that the prerogative commenced juristic life as the quality of the prince's title. The chapter then sets out the history of the prerogative, making the argument that the prerogative pre-dates the emergence of a distinct executive *department* of government.

Chapter 3 identifies the rich heritage of the decisional law which predates the Constitution and informs the textual choices made by the framers, and has, of itself, interpretative power in respect of the Constitution's text. The chapter identifies how three decisions of the Privy Council and two twin decisions of the Supreme Court of New South Wales describe the powers of colonial governorship. The chapter then examines the Supreme Court of Victoria's decision in *Toy v Musgrove*;[90] and concludes by identifying how the Privy Council disposed of the appeal without considering the constitutional issues in that decision.[91]

Chapter 4: This dissertation's argument relies on the history of the prerogative jurisprudence *before the enactment* of the Constitution, and the history *of the enactment* of the Constitution. Chapter 4 identifies what use can be made of the Debates in constitutional interpretation and then examines in detail the available evidence as to how the framers saw

90 (1888) 14 VLR 349.

91 *Musgrove v Toy* [1891] AC 272.

the prerogative operating in the new Commonwealth and its relationship to the executive power of the Commonwealth. The contributions to the Debates by the delegates to the First and Second Conventions are examined closely to see what interpretative assistance can be obtained. The Chapter identifies three conclusions that should be drawn from the *Official Reports*.

Chapter 5 identifies the orthodox view as to the nature of the relationship between the prerogative and the executive power of the Commonwealth. It does so by setting out the case law in respect of the two streams – the older authorities, and the emergence of a newer view in the High Court of Australia's more recent case law. The common law and inherent schools of thought are then set out. Having brought the jurisprudence up to date, the Chapter then sets out the high point of this dissertation – the *core argument*. The chapter sketches a theory about the relationship between the (correctly understood) prerogative, and the executive power of the Commonwealth; it is not intended as a comprehensive study of the executive power of the Commonwealth – rather, an assertion of the broad outline of the nature of the executive power of the Commonwealth now that it is textually (and doctrinally) decoupled from the prerogative.

Chapter 6 focuses upon various aspects of historical material, textual features, and doctrinal choices which this author describes as pillars which support the correctness of the core argument. In that sense, the material identified, and the arguments made, form the substratum of the core argument. When each pillar is considered, the reader is invited to conclude that the relationship between the prerogative and the executive power of the Commonwealth ought to be understood in accordance with the core argument. To do this this author has identified and used the various modalities of interpretation to show why there is substance to the core argument, and how it is fortified.

Chapter 7 identifies some recent developments emanating from the High Court of Australia's two most recent executive power cases – *Williams [No 2]*[92] and *Plaintiff M68*[93]

92 *Williams [No 2]* (2014) 252 CLR 416.

– to demonstrate where the core argument accords with the emerging jurisprudence. The Chapter also reflects upon the way in which the non-statutory executive power, including the prerogative non-statutory executive power, is amenable to judicial supervision and reflects more generally on the prerogative as a core aspect of a political constitution by identifying how the prerogative continues to have contemporary operation as both a bundle of legal rights, preferences, capacities and immunities, as well as a mechanism for political restraint.

X THE IMPORTANCE OF DOCTRINAL CLARITY

In any dissertation, the question arises, why? Why proffer the thesis or theorem set out in the dissertation? What utility does the thesis or theorem have in respect of the development of Australian constitutional law?

The nature of both the prerogative of the Crown and the executive power of the Commonwealth have significant ramifications for the legal authority of the executive government of the Commonwealth, and therefore for the citizenry of the Commonwealth. What the ministers of state of the Commonwealth can, and cannot do, without express statutory authority; or what the officers of the Commonwealth can, and cannot do, without express statutory authority, is of basal concern to the Commonwealth, and its peoples.

This dissertation seeks doctrinal clarity. Doctrinal clarity is important. It aids in the orderly exposition of constitutional principle; it protects against unwarranted attempts by executive governments from using the lack of clarity to achieve political objectives in a climate of constitutional uncertainty.

If the source (and therefore the scope) of the prerogative can be properly identified, then its content and relationship to the legislative, executive and judicial powers of the Commonwealth can be correctly appreciated. If the content (and therefore the scope) of the executive power of the Commonwealth, and its relationship with the prerogatives of the Crown can be correctly ascertained, then the exercise of the executive power of the

93 *Plaintiff M68* (2016) 257 CLR 42.

Commonwealth can be held to account by the exercise of the legislative and judicial powers of the Commonwealth.

As was demonstrated in the Full Court of the Federal Court's decision in *Ruddock v Vadarlis* (the *Tampa case*),[94] the scope of the prerogative as well as the scope of the executive power of the Commonwealth have very significant public policy consequences. Doctrinal clarity as to the outer limits of the executive power of the Commonwealth, and the accountability for the exercise of that power – in the Parliament and in the courts – is best achieved by a satisfactory degree of precision in the identification of how the power is textually recognised and affirmed in the constitutional text, and an understanding of its relationship to the text and structure of the Constitution, and to other constitutional doctrines.

The recent significant decisions in *Pape*, and *Williams [No 1]* and *Williams [No 2]*, also demonstrate the importance in achieving doctrinal clarity in respect of the relationship between the prerogatives of the Crown and the executive power of the Commonwealth. In those cases, what fell within the scope (or depth) of non-statutory executive power was critical to the outcome of the litigation, and, given the nature of the litigation, of particular public importance.

The importance of striving to achieve doctrinal clarity can be seen in the words of French CJ in *CPCF*, where the Chief Justice said:[95]

> Any consideration of the non-statutory executive power must bear in mind its character as an element of the grant of executive power contained in s 61 of the Commonwealth Constitution. The history of the prerogative powers in the United Kingdom informs consideration of the content of s 61, but should not be regarded as determinative. The content of the executive power may be said to extend to the prerogative powers, appropriate to the Commonwealth, accorded

94 (2001) 110 FCR 491.

95 *CPCF* (2015) 255 CLR 514, 538 [42].

> to the Crown by the common law. It does not follow that the prerogative content comprehensively defines the limits of the aspects of executive power to which it relates.

What does, or does not, fall within the depth dimension (described below) of non-statutory executive power requires the doctrinal resolution of the relationship between the prerogative and the executive power of the Commonwealth. To do so, it is necessary to clarify two things. First, which prerogatives have (or have not) been Australianised? Secondly, what are the nature and scope of the powers that fall within the non-statutory executive power, but which are not traditional prerogatives requires clarification?

Doctrinal clarity around the nature, scope and content of the executive power of the Commonwealth, and its relationship to the prerogative, guards against the temptation for the executive government of the Commonwealth to seek to expand the operation of the executive power by exploiting an absence of doctrinal certainty.

Doctrinal clarity also aids both the courts and potential litigants who seek judicial review of the exercise of acts of both statutory, and non-statutory executive power. As is set out in detail in Chapter 6, greater doctrinal clarity around the nature of both the prerogative and the executive power of the Commonwealth (understood in a functionalist sense) makes the task of judicially reviewing purported exercises of either a more analytical task, and reduces the likelihood, or need, for judges to resort to idiosyncratic, or abstract theories as to what an executive government can, and cannot do, without the express authority of the legislature. If this author is correct, and the executive power is correctly understood as a functionalist authority best described in contradistinction to the legislative and judicial powers, then judicially reviewing the acts of the executive government becomes more predictable for the executive government, and citizenry alike.

Finally, doctrinal clarity is important should there ever be a further attempt to amend the Constitution and remove the Crown from the Constitution and create a republican Commonwealth of Australia. If the core argument is correct, then there would need to be

enacted in the Constitution a new provision which affirms that the President has vested in him or her all the powers and functions which the Queen retained (as inhering in Her Majesty) prior to the removal of the office of Queen of Australia from the Constitution Act. This would ensure that those powers, capacities, immunities and preferences did not evaporate upon the change from a monarchical form of government to a republican form of government.

CHAPTER TWO

THE PREROGATIVE

I INTRODUCTION

The purpose of this Chapter is to introduce the royal prerogative and set out the relationship between the prerogative and executive power. The Chapter canvasses five aspects of the nature of the prerogative. First, the Chapter sets out the origins of scholarly enquiry into the nature of kingly power in England, commencing with the fusing of Roman jurisprudence with English law by Henry de Bracton. Second, the Chapter demonstrates that the prerogative, as a feature of the royal title, predates the emergence of the trinity of powers and doctrine associated with Montesquieu. Third, the Chapter identifies the point at which a discrete executive function of government emerged in English public law. Fourth, the Chapter identifies the competing definitions of "the prerogative". Fifth, the Chapter demonstrates, by reference to scholarly works and legal commentators of historical significance, that "the prerogative" has historically been given a wider meaning than "the executive power". Consequently, the executive part of government (exercising the executive power) is (to a substantial degree) part of, and not the sum of, the prerogative. That is, the two concepts are not coextensive.

II JURISTIC ANALYSIS OF THE SOVEREIGN'S POWER

The power and nature of monarchy emerged as a subject of scholarly enquiry in twelfth-century Europe. Definitions of princely authority in the early Middle Ages were said to be

"descriptive of rank, legitimacy, prerogatives, or privileges".[1] Frederick Barbarossa – the Holy Roman Emperor – ruled "the most powerful state of twelfth-century Europe".[2] Frederick I is credited with recognising the importance of Roman law and the role of "jurists in shaping a theory of empire",[3] and prerogative jurisprudence.[4] It was in the court of Frederick I that scholars first sought to describe the "rights of regalia".[5] The Emperor took a special interest in the law school at Bologna and Frederick's jurists "formulated a concise, succinct definition of imperial power based upon Roman precedents".[6] As legal historian, Randall Lesaffer, recorded:[7]

> In 1158, at the Imperial Diet in Roncaglia, Emperor Frederick Barbarossa promulgated a list of royal prerogatives and powers that belonged exclusively to the king (*regalia* or *iura regia*). For this, Frederick appealed to the *quattuor doctores*, the four great doctors or scholars of Roman law.

It was Frederick's deeds that "provided the jurists with ample inspiration to contemplate the authority and rights of the prince".[8] In this centre of scholastic endeavour, we find the birth of scholarly enquiry into the nature of kingship: what it meant to hold a princely title, where the quality, features and functions of the princely title stem from, and what they tend to become. In fact, whilst Frederick's jurists have the credit, the "bureaucratization and legalisation of power was a Europe-wide tendency at this time".[9]

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1 K Pennington, *The Prince and the Law,* 9.

2 Ibid.

3 Ibid 12.

4 R L Benson, "Political *Renovatio*: Two Models from Roman Antiquity", in R L Benson, et al, *Renaissance and Renewal in the Twelfth Century*, 360-367.

5 K Pennington, *The Prince and the Law*, 13.

6 Ibid 14.

7 R C H Lesaffer, *European Legal History: A Cultural and Political Perspective*, 231.

8 K Pennington, *The Prince and the Law*, 15.

9 R Tombs, *The English and Their History*, 65.

The prerogative "is, both in fact and theory, the oldest part of the English constitution",[10] and, whilst it can be dated from antiquity,[11] scholarly enquiry into the nature of kingly power is a more recent endeavour.

Kenneth Pennington gave an account of how the jurists of the twelfth and thirteenth centuries came to use the word "princeps" (or "prince"), reserving the generic title "for monarchs who had no superiors".[12] The princeps title can be traced back to its adoption by Augustus and was said to be a "perfectly colourless title".[13] In time, English "[w]riters were borrowing phrases from Roman law books and applying them to the English kingship".[14] Professor Pennington recorded that:[15]

> In the second half of the thirteenth century, a number of jurists attempted to fashion a more restricted definition of the prince. They argued that "prince" could only be used to describe the emperor as defined by Roman law. The prince had prerogatives and authority that kings did not possess. In particular, these jurists insisted that kings could not lay claims to the authority granted to the emperor by Roman law.

He further noted that when academic jurists considered the constitutional status of the monarchs of Europe:[16]

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10 W C Richardson, "The Surveyor of the King's Prerogative", (1941) *The English Historical Review* (Vol 56), 52.

11 J Allen, *Inquiry into the Rise and Growth of the Royal Prerogative in England*, 8-13. John Allen dates the rise of the prerogative to the Roman provincials.

12 K Pennington, *The Prince and the Law*, 90.

13 T M Taylor, *A Constitutional and Political History of Rome, From the Earliest Times to the Reign of Domitian*, 413.

14 C W Prosser, M Sharp, *A Short Constitutional History of England*, 29.

15 K Pennington, *The Prince and the Law*, 91.

16 Ibid.

> … they often equated the authority of a king with that of the emperor. By the late Middle Ages, after the national monarchs has established themselves as not only equal to, but, in real life, more powerful than emperors, this equation, king equals emperor, became an unexceptional commonplace. However, the academic lawyers rarely allow us to see European kings as the jurists themselves must have seen them: embroiled in disputes with their nobles over rights enshrined in customary law – "the good old law" – or hard pressed by developing institutions, like parliament, that demanded a share in the power to tax, wage war, judge and legislate.

Whilst there is a significant body of evidence suggesting the arrival of Roman law principles before the time of Henry III,[17] Professor Pennington identified Henry de Bracton as the principal source of the blending of the Roman law concept of kingly traits with the municipal law of England soon after the effective demise of the Angevin Empire. Pennington wrote that:[18]

> When Bracton discussed the relationship of the king and the law, he tried to explain the status of the king in English law and to incorporate into his work the new (for English lawyers) Roman law doctrines ...

A "jurist of Bologna would have extracted a coherent doctrine of legislative sovereignty by the year 1200",[19] and in his use of Roman law in his treatise on the laws and customs of England, Bracton had "cooked a heady broth".[20] This is how Pennington described

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17 R V Turner, "Roman Law in England Before the Time of Bracton", *Journal of British Studies* (Vol 15), 1.

18 K Pennington, *The Prince and the Law*, 92; see also T G Barnes, *Shaping the Common Law, From Glanvill to Hale, 1188-1688*, 104,105 and 156.

19 K Pennington, *The Prince and the Law*, 93.

20 Ibid 92.

Bracton's attempt to "to fit [the] massive structure of English private law into the rather flimsy framework of Romanesque public law".[21] Roman ideas about the quality of English kingship, along with juristic analysis of English kingship, can be dated back to this point.[22]

III THE ORIGIN OF "THE PREROGATIVE"

The origin of the concept, known today as "the prerogative", can be traced by examining its manifestation. As Churchill observed of the Angevin Crown, "[i]n an unwritten Constitution the limits of the King's traditional rights were vaguely defined".[23] In the unwritten English constitution, the conceptual source of royal power is necessarily one of evolution, and must be found in the pages of English history, rather than on the pages of a canonical text.

The word "prerogative" comes to us from antiquity. As Thomas Poole recently wrote, "[t]he Latin *praerogativa* not only referred to the tribe that voted first in the Roman Republican *Comitta* (and, by extension, a prior preference, privilege or claim) but also meant a token or omen".[24] The prerogative has always been a mystery. This mystery led Paul Halliday to observe:[25]

> By the end of the sixteenth century, the nature of the prerogative had become a matter of Trinitarian complexity, elusive owing to the inherent mystery of the concept and the greatness of the being who made it manifest. It had not always been so. In the later Middle Ages, commentators on the prerogative focused on

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21 Ibid 93; see also B Tierney, "Bracton on Government", *Speculum* (Vol. 38), 295-317; S J T Miller, "The Position of the King in Bracton and Beaumanoir'", *Speculum* (Vol. 31), 263-296; see also Lord Pearce's reference to Bracton in *Burmah Oil Company Limited v Lord Advocate* [1965] AC 75, 147.

22 T F T Plucknett, *A Concise History of the Common Law*, 244-250; F W Maitland, *The Constitutional History of England*, 17 and 18.

23 W S Churchill (editor), W S Churchill's *The Great Republic: A History of America*, 410. An abridgement of the author's *A History of the English-Speaking Peoples*, and edited by the author's grandson and namesake.

24 T M Poole, *Reason of State; Law, Prerogative and Empire*, 22.

25 P D Halliday, *Habeas Corpus, From England to Empire*, 65.

> those rights in land peculiar to the king. By this feudal view, prerogative was largely a list of uniquely royal possibilities for control over property rather than a theory or power. Lawyers disagreed about which items belonged on the list: various forms of escheat, wardship, and so on. While some might have thought the list longer than others, all were more interested in the king as landlord than in the king as lord.

The origin of the prerogative concept may be described as the evolution of power in what became the English royal court. Allen wrote that "[t]he government of the Roman world had been for ages a pure, unmitigated despotism", and "[t]he prince possessed in theory, and exercised in practice, every power of the state".[26] He continued: "The legislative, judicial, and executive functions of government, were united in his person".[27] Adam Tomkins wrote more recently that "[i]n England power started with the Crown".[28] Power was not the by-product of some revolutionary event but rather "emerged".[29] Allen went as far as to say that "[i]n law, [the English king's] prerogative has been held to be the same with that claimed or possessed by the Roman Emperors".[30]

The prerogative, as a body of principle which evolved into legal doctrine, commenced its juristic life as *a quality*: the quality of sovereignty, or the quality of the princely title. The quality of the English king's title was, as Poole has recently written, "bound up with the idea of *majesty*".[31] This is illustrated by the older treatises on the prerogative which commence their consideration of the subject matter by proclaiming the exalted, and formerly divine, nature or quality of English kingship. Kings are oft-described in older

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26 J Allen, *Inquiry into the Rise and Growth of the Royal Prerogative in England*, 13.
27 Ibid.
28 A Tomkins, *Public Law*, 39.
29 Ibid.
30 J Allen, *Inquiry into the Rise and Growth of the Royal Prerogative in England*, 24 (original emphasis).
31 T M Poole, *Reason of State, Law, Prerogative and Empire*, 22 (original emphasis).

authorities as God's "lieutenant on earth".[32] It has been said "that Roman imperialist doctrines were being appropriated to enhance the status of the English monarch at the time of the investiture contest".[33] The description of the English kingship can also be said to have originated with Bracton, who wrote in his *De Legibus et Consuetudinibus Angliae* (and which was approvingly quoted by the Great Commentator) that: "*Rex est vicarious et minister Dei in terra: amnis quidem sub eo est, et ipse sub nullo nisi tantum sub Deo*".[34] Halsbury's *Laws of England* traced the prerogative to "the times of Bracton".[35] And Bracton was said to have "founded the royal authority on law".

Historian David Carpenter goes back earlier when he wrote of Henry II rebuking the Bishop of Chichester for challenging the King's "God-given majesty, dignity and rights of the crown"; and telling us that "[t]he concept of the incorporated crown, to which rights and possessions attached (as opposed to them being attached to the person of an individual king), had come to prominence under Henry I".[36] Sir Owen Dixon traced the majesty of kingship from a little later, saying that:[37]

> The conceptions of the royal office which prevailed for so many centuries are the product of the century in which Bracton lived. In the thirteenth century they spread over Europe. Many of the notions of royalty, including the doctrine,

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32 *Cawley's Case* (1591), 5 Co. *Rep*. 8b, 77 ER 10 (Sir Edward Coke); *Case of the Master and Fellows of Magdalen College* (1615), 11 Co Rep, 72a; 77 ER 1243 (Sir Edward Coke), and citing Sir John Fortesque, *De Laudibus*, 23-24.

33 R V Turner, "Roman Law in England Before the Time of Bracton", *Journal of British Studies*, 1975 (Vol. 15), 3; quoting from N F Cantor, *Church, Kingship and Lay Investiture in England 1081-1135*, Princeton University Press, 1958, 280. Some Commonwealth judges in the Pacific believe that: "The royal prerogative can be traced back 1,000 years to the Norman Conquest": *Qarse v Bainimarama* [2009] FJCA 67 at [120] (Gates ACJ, Byrne and Pathik JJ).

34 W Blackstone, *Commentaries*, Bk I, 234: "The King is the vicegerent and minister of God on earth: all are subject to him; and he is subject to none but to God alone".

35 Halsbury's *Laws of England* Vol. 8(2), (Fourth Edition), paragraph 368, n. 1; see also S Payne, "The Royal Prerogative", in M Sunkin & S Payne's *The Nature of the Crown, A Legal and Political Analysis*, 86-87; J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, 22-28.

36 D Carpenter, *The Struggle for Mastery*, 196.

37 O Dixon, "The Law and the Constitution", *Jesting Pilate*, 40-41.

> which appears so strange to us, of the divine right of Kings, originated in the majesty of the Emperor of the Holy Roman Empire. The divinity which surrounded his office was transferred to other monarchies.

During the reign of Richard II the blending of the Roman law concepts of sovereignty with the English kingship intensified. Ricardian historian Nigel Saul wrote that Richard's kingship owed much to the ideas of the thirteenth century writer Giles of Rome. Giles argued that "all honour and privilege in society flowed from the king … [and] the king's subjects should be obedient to him".[38] Richard II was "seen in ritualistic terms as a sacred icon, supreme and all-powerful. He was invested with a mystical, almost a godlike, quality".[39] Richard was the first monarch to be known by the title "your highness and royal majesty" or "your most excellent and powerful prince".[40] Richard elevated the quality of his princely title to almost Augustus-like proportions.

During the reign of Elizabeth I the sovereign was described as "the most excellent and worthiest part or member of the body of the common wealth" to whom "honour, dignity, prerogative and pre-eminence" was attributed.[41] Indeed, the "nature and extent of regal authority not having been accurately defined during the time which preceded the reign of the Tudors, the exorbitant power of the princes of that house had gradually introduced political prejudices of even an extravagant kind", said de Lolme in 1784.[42]

During the reign of Charles II the Imperial Crown of England was said to be an "absolute and independent Power, the Supreme Dignity of England, that acknowledged no

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38 N Saul, *Richard II*, 250.

39 Ibid 239.

40 Ibid 238; see also N Saul, *The Three Richards; Richard I, Richard II, and Richard III*, 60; D Jones, *The Plantagenets, The Kings Who Made England*, 558.

41 W Staunforde, *An Exposition of the King's Prerogative collected out of the great Abridgment of Justice Fitzherbert, and other old Writers of the Laws of England*, Ch I. Classical authors like Bracton, Staunforde, and Chitty were cited and considered in respect of the prerogative by the superior courts of England in the years just prior to Federation, see for example *Perry v Eames* [1891] 1 Ch D 658, 663, 668.

42 J L de Lolme, *The Constitution of England*, 83.

Superior, but God Almighty, not to be Divided, Communicated, nor transferred to any person whatsoever".[43]

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At the time of the Stuart Restoration, Sir Matthew Hale wrote in his *History of the Common Law* that the common law included *Lex Prerogativa*, and further describing it as "that which asserts, maintains, and with all imaginable Care provides for the Safety of the King's Royal Person, his Crown and Dignity, and all his just Rights, Revenues, Powers, Prerogatives and Government, as the great Foundation (under God) of the Peace, Happiness, Honour and Justice, of this Kingdom …".[44]

Indeed, the life and writings of Sir Matthew Hale[45] are particularly illuminating in respect of the qualities of the English Crown. Whilst much of Hale's writings were not published during his lifetime, three in particular are illuminating as to the royal authority. The manuscripts for *Incepta de Juribus Coronae*, then *Preparatory Notes touching the Rights of the Crown*, and finally, *Prerogativa Regis* were each drafted by Hale between the Civil War (most likely towards the end of the Interregnum, or early after the Restoration) and during the reign of Charles II, but were not published during his lifetime. *The Rights of the Crown* and *Prerogativa Regis* became available in select circles at or around 1790 and 1788 respectively. All three were brought together and incorporated into a single text by D E C Yale for the Selden Society in 1976, and entitled *Sir Matthew Hale's The Prerogatives of the King*. Whilst this text (as an amalgam) was not published until 1975, the way in which Hale described the prerogatives of the Crown especially illuminates how the prerogative was viewed (particularly by Chief Justice Hale as the most senior member of

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43 J Brydall, *His Majesties Royal Rights and Prerogatives Asserted, Against Papal Usurpations, and all other Anti-Monarchical Attempts and Practices*, 2.

44 M Hale, *History of the Common Law*, 1713. Written during Hale's life (1609-1676), and probably soon after the Restoration.

45 Matthew Hale was successively a justice of the Court of Common Please (1654-1658), the Chief Baron of the Exchequer (1660-1671), and finally the Chief Justice of the King's Bench (1671-1676).

the King's Bench) during the Restoration, and provides valuable historical material as to the nature of the prerogative in English history.

Hale's *Prerogatives* is particularly important for three reasons. First, Hale's *Prerogatives* is the earliest taxonomy of the prerogatives of the Crown. Just as Joseph Chitty's *Prerogatives of the Crown* (published in 1820) is the most recent taxonomy; Hale's *Prerogatives* is the earliest that this author can locate. The idea that the prerogative can be conceptually illustrated diagrammatically is demonstrated by the seven tables (or, as Hale called them, his *Tabulae Prerogativae Regis*) set out at the commencement of Hale's *Prerogatives*.[46]

Second, as his editor David Yale wrote, Hale set out that the prerogative is "[t]he sum of the king's powers of government [which] he called the *jura summi imperii*". Hale identified those "principal powers" as: "(1) Declaring war and peace. (2) Giving value and legitimation to coin. (3) Pardoning the punishment of public offences. (4) Administering the common justice of the kingdom, civil and ecclesiastical. (5) Raising forces by land and sea. (6) Making laws."[47]

Third, whilst the language of "executive", or "executive power" had not, at the time, taken a foothold in English jurisprudence, we can see that Hale compartmentalised the origins of the executive function of government under two headings in his notes. In Chapter X, entitled "Concerning the King's Council, And First of His *Concilia Ordinaria* and His Privy Council", Hale described the king's four councils as "[first] his private or privy council, secondly, his legal council, thirdly, his military council, fourthly the council domestical or of his household".[48] Of his legal council, Hale said that it is "sometimes styled *concilium ordinarium*", and that it "consisted of the great officers of state and justice within the kingdom". The legal council included the Chancellor, Treasurer, Keeper of the Privy Seal, Chancellor of the Exchequer, Justices of both Benches, Barons of the

46 D E C Yale, *Sir Matthew Hale's The Prerogatives of the King*, xii to xx.
47 Ibid xlvii.
48 Ibid 105.

Exchequer, Master of the Rolls, King's attorney and serjeants, Masters of the Chancery, and the Chancellor of the Duchy. According to Hale, the members of the council "were bound to advise the king in such questions as concern law or government".[49] He further described the members of the council as "the distributors of the king's judgment and will according to rule, for he [the king] neither speaks nor doth anything in the public administration of the realm but what he doth by these or some of these [members of council], especially the chancellor".[50]

In Chapter XVIII, entitled "Of Temporal Coercion, Process, Continuance, and Executions, And of The King's Powers Therein", Hale said that:[51]

> Coercion is that whereby the judicative power is acted and without which there can be no jurisdiction, and whereby the king upon complaint either of a particular man or of a country, as by indictment, or of his attorney, may enforce the person complained of to come to judgment and to execute it.

Hale continued:[52]

> … there be two general parts of legal coercion *viz*. that which precedes judgment, and that which follows. The coercion preceding the judgment is the process of law, that which follows is the execution.

These views of Hale, written in an age just prior to, or contemporaneously with, the emergence of a discrete executive function of government (discussed in the next part of

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49 Ibid 106.
50 Ibid 107.
51 Ibid 191.
52 Ibid.

this Chapter), demonstrate that the quality of the English Crown included a developing machinery for the execution of the royal rights, dignities and capacities.

During the reign of George II, the noted author of various legal treatises, Giles Jacob, wrote in his treatise on the prerogative of the Crown that, "if the Crown descend to the Right Heir, he is *Rex* before Coronation, as there must be always a King in whose Name Laws are to be maintain'd and executed".[53] Describing the prerogative of the King as "so very extensive and excellently contriv'd",[54] Jacob went on to summarise the prerogative. What is evident is how extensive and detailed Jacob was in setting out the common law attributes of the Crown. What is also evident is how much the detail of the rights, preferences, capacities and immunities of the Crown, recognisable to a twenty-first century constitutional lawyer, were clearly well-established in the learned literature of almost 300 years ago.[55]

Additionally, there are three features of Jacob's exposition which ought to be emphasised. First, Jacob described the Sovereign's authority to maintain and execute the laws of the realm as being a function of the Sovereign (and he included that function as part of his consideration of the prerogative); second, Jacob particularised a further set of prerogative matters – which broadly accord with (or at least are recognisable as) the modern state of the prerogative in Britain; and third, it is clear that by the time of George II, the prerogatives of the Crown were well developed and known, at least in scholarly circles. Indeed, in this respect, it has been said that the prerogative "has been hardwired into British constitutional thinking" since at least the seventeenth century.[56]

During the reign of George III, William Blackstone described the king as "the supreme executive power of the English nation",[57] and set out the quality of the king's title in his

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53 G Jacob, *Lex Constitutionis,* 65.

54 Ibid 71.

55 Ibid 71-73.

56 T M Poole, "United Kingdom: The royal prerogative", ICon (2010), Vol 8, No 1, 147.

57 W Blackstone, *Commentaries*, Bk I, 183.

Commentaries on the Laws of England as a precursor to describing the various branches of the king's prerogative.[58] Blackstone's *Commentaries* are widely cited in respect of the prerogative.[59] His description of the quality of the kingly power commenced with an observation that "by the word prerogative we usually understand that special pre-eminence, which the king hath".[60] The king's direct prerogatives are said to stem from "such positive substantial parts of the royal character and authority, as are rooted in and spring from the king's political person, considered merely by itself".[61] The kingly quality, or dignity, "was supported, in the eyes of the people, not only by the splendour of his royalty, but by the lowly reverence paid him by the greatest of his lords".[62]

Paul Halliday made a similar observation about the *quality* of Blackstone's king. Professor Halliday saw in Blackstone's *Commentaries* an ascription to the king not of a "sacredness", but of a certain "quality". He observed:[63]

> At first blush, chapters 3 (Of the King and his Title), 6 (Of the King's Duties), and 7 (Of the King's prerogative) of Book I look like standard fare, easily read in terms familiar for centuries. Blackstone opens chapter 3 with confidence: 'The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen...[who] is immediately invested with all these ensigns, rights and prerogatives of sovereign power'. The monarch has '(in subservience to the law of the land) the care and protection of the community';

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58 Ibid Chapter III.

59 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [No 2]* (2009) 1 AC 453, 484 [43] (Lord Hoffman), 491 [70] (Lord Bingham), 496 [87] (Lord Rodger), 508 [124] (Lord Carswell), 529 [151] (Lord Mance).

60 W Blackstone, *Commentaries*, Bk I, 232.

61 Ibid 232-233.

62 F S Sullivan, *Lectures on the Constitution and Laws of England with a Commentary on Magna Carta, and Illustrations of many of the English Statutes*, 235.

63 P D Halliday, "Blackstone's King" in Wilfrid Prest, *Re-Interpreting Blackstone's Commentaries, A Seminal text in National and International Contexts*, 174.

> to the king ‘in return, the duty of allegiance of every individual are due’. In chapter 6 – and again in chapter 10, on aliens and natives – Blackstone develops this point, drawing straight from *Calvin’s Case*: ‘protection and subjection are reciprocal’. Blackstone offers further definition of the prerogative in chapter 7. By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity’. There is nothing here of the mystical being that one encounters in discussions of the prerogative two centuries earlier. But Blackstone obliges soon enough, noting how ‘The law therefore ascribes to the king ... certain attributes of a great and transcendent nature ... by law the person of the king is sacred’.

Joseph Chitty, soon after the accession of George IV, described the king of England in his *Prerogatives of the Crown* as “not only the chief, but properly the sole, magistrate of the nation; all others acting by commission, and in due subordination to him”. The quality, or “attributes” of the kingly throne “are principally sovereignty or pre-eminence”, and “perfection”.[64] Before setting out a taxonomy of the prerogatives then recognised, Chitty grandiloquently said that the king is the “supreme executive magistrate”.[65]

With the vicissitudes of the Tudor, Stuart and Hanoverian reigns, the prerogative morphed from being described as the quality of kingship (and by the time of Mary Tudor, queenship),[66] to the rights, preferences, capacities and immunities of kingship. Thus, the quality of the king begot the king’s prerogatives. The king was said to be sovereign, thus the king’s power of legislating, suspending laws and making proclamations developed. The king was said to demand allegiance from his subjects, thus the king’s capacity to send and

64 J Chitty, *Prerogative of the Crown,* 4.

65 Ibid 3.

66 Strictly speaking, Lady Jane Grey – her accession having been recognised by the Council; she reigned from 10 to 19 July 1553.

receive ambassadors emerged with the evolution of the modern European state. The king's quality made him the fountain of justice, thus he enjoyed immunity from suit from his subjects in the king's courts. The transition from a broad conception of the quality of kingship to a prescriptive understanding of the scope and ambit of the king's rights, preferences, capacities and immunities was essentially "the result of a constitutional struggle".[67] Or, as Sheldon Amos put it, the king "simply retains to the full all the attributes, capacities, functions and dignity which revolutions and silent constitutional changes have not taken away".[68]

In this sense, there is another way to understand the concept of the prerogative; and that is in terms of it as a political reality. Referring to the historical analysis of Maitland, Sebastian Payne presented the prerogative as "a reflection of the strength of the King rather than being the source of the King's strength".[69] In that sense, he said that constitutional theory "was not a guiding force but a reaction or a rationalisation of the prevailing political reality".[70] It is in this sense that the prerogative must always be understood in terms of historical analysis, and the body of rules that constitute the prerogative are, as Sir William Wade put it, "rules legitimated by history".[71] This understanding of the prerogative draws a further conceptual aspect to the fore. Whilst the prerogative is understood in British constitutional terms as a body of the Sovereign's rights, capacities, immunities and preferences recognised by the common law, the expression "prerogative" is also used in the language of political science. When Locke wrote of the prerogative in his *Second Treatise of Civil Government* he was referring to the prerogative in terms of political discourse –

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67 *Viscountess Rhondda's Claim* (1922) 2 AC 339, 353 (Viscount Birkenhead LC).

68 S Amos, *Fifty Years of the English Constitution*, 210.

69 S Payne, "The Royal Prerogative", in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis*, 82.

70 Ibid.

71 H W R Wade, "The Crown, Ministers and Officials: Legal Status and Liability", in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis*, 32.

rather than to constitutional principle.[72] The observation of the prerogative being "a reflection of the strength of the King rather than being the source of the King's strength" is more reflective of political science, rather than legal science. And it demonstrates the close proximity that there is (as there is in most areas of constitutional law and theory) between the prerogative as recognised by the common law, and the felt necessity for the executive magistrate to be able to "act according to discretion, for the public good, without the prescription of the law, and sometimes even against it".[73]

IV THE ORIGIN OF THE EXECUTIVE FUNCTION OF GOVERNMENT

Whilst it is not central to this dissertation's purpose to delve into the history of the separation of powers, it is important to identify the point at which, in English constitutional theory, philosophers begin to recognise or reflect the emergence of an executive function, or power, of government within the English Constitution.

Professor Maurice Vile's *Constitutionalism and the Separation of Powers* is a relatively recent and elegant survey of the history of the doctrine. It identified the emergence of the executive function of government between the English Civil War and the end of the seventeenth century.

Tracing the executive function back to the writings of the fourteenth century Italian scholar, Marsilius of Padua, Vile quoted Marsilius as saying: "The execution of legal provisions is effected more conveniently by the ruler than by the entire multitude of citizens since in this function one or a few rulers suffice."[74] Writing in respect of Marsilius, Professor Vile expressed the view that the Italian scholar:[75]

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72 L C Feldman, "Lockean Prerogative: Productive Tensions", in C Fatovic and B A Kleinerman, *Extra-Legal Power and Legitimacy, Perspectives on Prerogative*, 75.

73 J Locke, *Second Treatise of Civil Government*, § 160.

74 M J C Vile, *Constitutionalism and the Separation of Powers*, 31, citing Marsilius of Padua's *Defensor pacis*, (*The Defender of the Peace*) (1324), I, 15.

75 M J C Vile, *Constitutionalism and the Separation of Powers*, 31.

> … had a clear distinction of functions in mind, and he placed them in distinct hands, but his concern was with the division of labour on grounds of efficiency, not with an attempt to limit the power of government by setting up internal division; he was not, therefore, directly concerned with the "separation of powers" as we have defined it.

Writing in reference to the judicial power (as distinct from an executive power), a modern scholar has noted that whilst Marsilius "does not speak directly to the independence of the judiciary … the executive's function is judicial in nature" in Marsilius' theory.[76] The gradual separation of the judicial and executive functions led Professor Vile to caution against seeing too much in the writings of pre-English Civil War scholars:[77]

> … the use of the term *executive* by Marsilius, and its use by most writers until the end of the seventeenth century, is that Marsilius meant by this essentially what we should describe as the judicial function, the function of the courts headed by the ruler, which put the law into effect. He did not distinguish between the judicial and the executive functions, and indeed the idea of a separate executive function is a relatively modern notion, not being fully developed until the end of the eighteenth century. Marsilius saw the legislative and "executive" functions as branches of the over-all judicial function.

Professor Vile further explained:[78]

> … the roots of the idea of a judicial "power" distinct from the executive go a long way back into seventeenth-century England, nevertheless the dominant

76 S D Gerber, *A Distinct Judicial Power, The Origins of an Independent Judiciary, 1606-1789*, 13.
77 M J C Vile, *Constitutionalism and the Separation of Powers*, 31.
78 Ibid 31-32.

> view of the division of government functions remained a twofold division into "legislative" and "executive". The modern notion of an executive power distinct from the machinery of law enforcement through the courts, could hardly be envisaged in an age when almost the only impact of government upon the ordinary citizen was through the courts and the law-enforcement officers. The "executive power" meant, then, either the function of administering justice under the law, or the machinery by which the law was put into effect.

Evincing the correctness of this view, Professor Vile pointed to the writings of the Bishop of Winchester (and an acolyte of Thomas Cranmer), John Poynet, who, in 1556, expressed this principle in his *Short Treatise of Politicke Power*. Bishop Poynet, writing of the authority to make laws and of the power of the magistrates to execute them, commented, said Vile, that: "lawes without execution, be no more profitable, than belles without clappers".[79]

In demonstrating that the prevailing orthodoxy of the time was to view the executive and judicial functions as one and the same thing, Professor Vile identified a number of seventeenth-century writers as broadly according with the view that the executive and judicial functions are, or ought to be, viewed as a single function of government.[80]

First, Vile identified James Harrington, who (originally in 1656) defined the "executive order" as that part of the science of government which is styled "of the frame, and course of courts or judicatories".[81] Second, Vile pointed to parliamentarian and republican political writer, Algernon Sidney, who, writing somewhat later in 1680, defined the executive function in terms which we should today consider purely judicial. Sidney divided government between "the sword of war" and "the sword of Justice." "The Sword of justice comprehends the legislative and executive Power: the one is exercised in making

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79 Ibid 32.

80 Ibid 32.

81 J Harrington, *The Oceana and Other Works of James Harrington, with an Account of His Life*, 54.

Laws, the other in judging controversies according to such as are made".[82] Third, the great poet and Commonwealthsman, John Milton, wrote of the need for the execution of law by local county courts so that the people "shall have Justice in their own hands, Law executed fully and finally in their own counties and precincts".[83] And finally, in 1656, Marchamont Nedham defined those who held the executive power (Vile tells us), as the constant administrators and dispensers of the law and justice.[84] Summarising the prevailing pre-Civil War theory, Professor Vile wrote:[85]

> It is not clear how far seventeenth-century writers included in the "executive power" aspects of the government machine other than the courts, or included ideas about those functions of government which we should today label "executive" or "administrative," rather than "judicial." Certainly many writers mention non-judicial officials and non-judicial functions of the prince.

After touching upon the views of Jean Bodin, Walter Raleigh, Thomas Hobbes and Samuel Pufendorf, Professor Vile summarised:[86]

> Broadly speaking, then, we must see the seventeenth-century abstraction of the functions of government as a twofold one in which "executive" was generally synonymous with our use of "judicial," and in fact in the latter part of the century the two words were used synonymously.

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82 A Sidney, *Discourses Concerning Government*, III, 10, 295.

83 M J C Vile, *Constitutionalism and the Separation of Powers*, 32; quoting J Milton, *The Ready and Easy Way* to *EstablIsh a Free Commonwealth*, in *Works*, Amsterdam, 1698, Vol. II, 795.

84 M J C Vile, *Constitutionalism and the Separation of Powers*, 32; quoting M Nedham, *The Excellence of a Free State*, 1656, 212.

85 M J C Vile, *Constitutionalism and the Separation of Powers*, 32-33.

86 Ibid 33; See for example Sidney's use of the terms, *Discourses*, III, 10, 296.

Professor Vile continued:[87]

> It took a century, from the English Civil War until the mid eighteenth century, for a threefold division to emerge fully and to take over from the earlier twofold division. However, the notion of an independent "judicial power," at any rate in the sense of the independence of the judges, goes back beyond the seventeenth century, and during the English Civil War the basis was laid for a threefold division which never quite managed fully to materialize … the view that there were three distinct "powers" of government seems to have emerged during the English Civil War.

Professor Vile credited the first sprouting of the idea that there is a distinct executive function of government to the administrative leadership of the Cromwellian Protectorate.[88] In 1649, Oliver Cromwell's private secretary, John Sadler, used the analogy of the writs to develop a threefold category of government functions, legislative or original, judicial, and executive: "If I may not grant, yet I cannot deny, Originall Power to the Commons, Judiciall to the Lords; Executive to the King".[89] Sadler wrote: "It may be much disputed, that the legislative, judicial, and executive power should be in distinct subjects by the law of nature".[90] Less than a decade later (in 1657), the most effective use of Sadler's description was made by George Lawson (a cleric and critic of Thomas Hobbes) who also

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87 M J C Vile, *Constitutionalism and the Separation of Powers*, 34.

88 Ibid 35.

89 M J C Vile, *Constitutionalism and the Separation of Powers*, 35; quoting J Sadler, *Rights of the Kingdom; or, Customs of our Ancestors: Touching the Duty, Power, Election, or Succession of our Kings and Parliaments*, 92; and quoted by F D Wormuth, *The Origins of Modern Constitutionalism*, 60-61.

90 J Sadler, *Rights of the Kingdom; or, Customs of our Ancestors: Touching the Duty, Power, Election, or Succession of our Kings and Parliaments*, 92; The late Professor Ronald Hamowy also appears to attribute the first recognition of an "executive" function of government (as distinct from the judicial function of government) to John Sadler: R Hamowy (editor), *The Collected Works of F A Hayek, Volume XVII, The Constitution of Liberty, The Definitive Edition*, The University of Chicago Press, 2011, 250, footnote 58.

formulated the threefold legislative, judicial, and executive division of functions and, as Vile said, argued it out to a much greater extent than Sadler.[91]

Professor Vile cautioned against concluding that the use of these terms by John Sadler and George Lawson was characteristic of their modern usage. Vile said that Sadler and Lawson "saw the judicial and executive functions, respectively, in terms of judgement, and the carrying out of the sentence of the Court".[92]

Professor Vile also identified a work, dated 1648, and entitled *The Royalists Defence,* and attributed to Charles Dallison, who was a Recorder of Lincoln. Vile tells us that Dallison made a clear distinction between the "soveraigne power of government," which is in the King, and the authority to judge the law. "The Judges of the Realme declare by what Law the King governs, and so both King and people [are] regulated by a known law".[93] Charles Dallison did not use the term "executive power," as he was splitting the seventeenth-century executive function into two parts, the functions of governing and of judging. In addition, Parliament had the function of making the law, so he arrived at a threefold division of government functions very close to that which came to be generally accepted a century later. "It is one thing to have power to make Lawes, another to expound the Law, and to governe the people is different from both".[94] Professor Vile concluded that:[95]

> … the cauldron of the [English] Civil War [has] hastened the evolution of the ideas of the functions of government and formed them into two main streams. The dominant conception was still the twofold division of executive and

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91 M J C Vile, *Constitutionalism and the Separation of Powers*, 35; citing G Lawson, *An Examination of the Political Part of Mr Hobbs his Leviathan,* R White for Francis Tyton, London, 1657, 8.

92 M J C Vile, *Constitutionalism and the Separation of Powers*, 35.

93 Ibid; citing C Dallison, *The Royalists Defence*, 1648, A2.

94 M J C Vile, *Constitutionalism and the Separation of Powers*, 35; citing C Dallison, *The Royalists Defence*, 1648, 70.

95 M J C Vile, *Constitutionalism and the Separation of Powers*, 36.

> legislative which reflected an older tradition about the functions of government, but the first elements of a new basis for ideas about these functions were being developed.

After the Stuart Restoration, the constitutional ideas that germinated during and soon after the English Civil War were not lost "for the elements in Sadler, Lawson, and Dallison all reappear in the theory of the balanced constitution at the opening of the eighteenth century".[96] Furthermore, the idea that the execution of the law was a royal duty was well established by the time that Edmund Burke wrote his *Reflections* in 1790.[97] A century later the Supreme Court of New South Wales was explicitly recognising that it was for the executive to execute the law.[98] In *Ex parte Woo Tin*, in addition to making some strident remarks about the rule of law, Darley CJ said (referring to the ministry) that the Court finds itself "disregarded" by those who were:[99]

> … by the duty they owe their country, and by their oath of allegiance to their Sovereign, bound to see that the law of their country as pronounced by properly constituted authorities (the Judges of the land), is duly and faithfully carried into execution. The constitution of our country does not provide the Judges with a separate staff of officers for the purpose of enforcing obedience to the decrees and judgments of the Court. The constitution casts this duty upon the executive, and never before in the history of any British community, so far as our knowledge extends, has this sacred duty been disregarded.

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96 Ibid.

97 E Burke, *Reflections on the Revolution in France*. Edmund Burke wrote (at 201): "To execute laws is a royal office; to execute orders is not to be a king".

98 *Ex parte Woo Tin* (1888) 9 NSW LR 493-494.

99 (1888) 9 NSW LR 493-494 (Windeyer and Innes JJ concurring).

Priestley JA provided a useful modern description of the executive function (in the context of the government of New South Wales) which can now be taken to be an accurate description of the executive function of government. His Honour said in *Egan v Chadwick*:[100]

> … the function of the Executive is to administer the carrying out of existing law in accordance with its policy from time-to-time, to keep all its administrative policies under review, and to formulate further policy which it thinks desirable in the public interest which can be put into effect either on the basis of the law as it stands or if parliament passes legislation which will enable the further policy to be lawfully carried out. All of this is to be done in the public interest.

V THE PREROGATIVE PREDATES MONTESQUIEU'S TRINITY

The modern tripartite division of governmental functions and powers into the legislative, the executive and the judicial is usually attributed to Charles-Louis de Secondat, Baron de Montesquieu, and his *De l'esprit des lois* (the *Spirit of the Laws*), published in 1748. Whilst Montesquieu told us little about sovereignty, said Theodore Plunkett, "he has a good deal to say about liberty".[101] "He regards liberty as best assured by the supremacy of law rather than of men, and to achieve this the best way, in his opinion, was the separation of powers".[102] Montesquieu's formulation of the separation of powers is indebted to the earlier writings of English philosopher John Locke.[103] Montesquieu said in relation to the British Constitution:[104]

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100 (1999) 46 NSWLR 563 at 592. Professor Anne Twomey approvingly quotes this passage as describing the executive power of a State in *The Constitution of New South Wales* at 585.

101 T F T Plunkett, *A Concise History of the Common Law*, 69-70.

102 Ibid.

103 Ibid 70.

104 C de Montesquieu, Vol I, 181.

> In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.
>
> By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.

Montesquieu warned that:[105]

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Whilst English writers borrow Montesquieu's descriptions of "legislative", "executive" and "judicial" powers, the Montesquieuian division of governmental powers is a framework and theory of dividing power (for the purpose of protecting liberty) which significantly post-dated the emergence of the prerogatives of the Crown. The distinct body of powers, preferences, capacities and immunities of the Crown had well and truly emerged from the quality of kingship by the time Montesquieu analysed the British Constitution. At least four

105 Ibid.

centuries had passed since Henry de Bracton first attributed certain qualities to English kingship.

The prerogatives of the English Crown significantly predate the emergence of an "executive" in the Montesquieuian sense. Evidence of this can be found as far back as a Year Book case from 1461. Sir Walter Moyle, a justice of the Common Pleas said that "the king is held (as a matter) of right to administer law to each of his subjects".[106] Evidence of this can also be found in John Brydall's short treatise, written in 1680 (and sixty-eight years before Montesquieu's masterpiece), where Brydall wrote in reference to the Sovereign's prerogative right to tribute that: "It is (said Plowden in his *Commentaries*) the Office of the King, to preserve his Subjects in Peace, and their Preservation doth consist, in the due Execution of the Laws, and in Armour to defend them against al Hostility".[107] Further evidence of the advanced development of the prerogatives of the Crown by the time of the emergence of the executive function of government is present in the three sets of notes prepared by Sir Matthew Hale, which were ultimately published as *Sir Matthew Hale's Prerogatives of the King*.

The point was made by Sir William Anson:[108]

> In our constitution we can say not only that the executive and legislative processes are distinct … , but that we can trace the process by which their powers have become distinct. The common element in both is the Crown; the Crown in council once made laws and also conducted the business of government, and its powers in these matters have gradually and for different reasons passed into the hands of two different bodies. The need for money

106 Year Book, Hilary Term, 39 Henry VI, pl. 3, ff. 38b-40b; Sir Edward Coke approvingly quoted these words, see D C Smith, *Sir Edward Coke and the Reformation of the Laws, Religion, Politics and Jurisprudence, 1578-1616*, 260.

107 J Brydall, *His Majesties Royal Rights and Prerogatives Asserted, Against Papal Usurpations, and all other Anti-Monarchical Attempts and Practices*, 121. Edmund Plowden's *Commentaries* were first published in 1571.

108 W R Anson, *The Law and Custom of the Constitution*, Vol I, 40-41.

> which the Commons alone could supply, gave them, as we have seen a hold upon legislation; while the jealousy of the great feudal lords who made up the Council, and the inevitable of business beyond the capacity of an individual to transact, tended to place the conduct of the executive in the hands of servants or ministers of the Crown. The legislative and executive powers of the Crown have, as it were, bifurcated, and there is a real dualism in our constitution, the Crown in Parliament, and the Crown in Council ...

Sir William continued:[109]

> We shall understand our constitution better if we remember that the Crown in Council was once the sole repository of sovereign power, whether executive or legislative; and that this power has now passed into two different sets of hands, Ministers and Parliaments. The Crown, through its Ministers, does the acts of State; the Crown in Parliament, enacts laws.

The same point was made by Professor Adam Tomkins in his *Public Law* where he presented the view that English public law was not founded on an historical evolution of a discrete English legislature, executive and judiciary. Rather, Tomkins made the argument, that "English public law is based on a separation of power not between legislature, executive and judiciary, but between the Crown and Parliament".[110]

Power in England originated in the Crown. In the course of English history power shifted from the Crown to Parliament as a consequence of the great constitutional struggles. This is evinced through Thomas Macaulay's very partisan exhortation of the Whig view of English history:[111]

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109 Ibid 41.

110 A Tomkins, *Public Law*, 47.

111 R Tombs, *The English and Their History*, 266.

> When I look back on our history, I can discern a great party which has, through many generations, preserved its identity, [which] has always been in advance of the age, [which] steadily asserted the privileges of the people, and wrested prerogative after prerogative from the Crown … To the Whigs of the seventeenth century we owe it that we have a House of Commons. To the Whigs of the nineteenth century we owe it that the House of Commons has been purified.

In more recent times, another writer wrote when comparing aspects of the English and French Constitutions that "the history of English constitutional law is to a great extent the history of the struggle between the rights based on the prerogative and the rights of Parliament".[112] Tomkins proffered the view that English power is separated and divided between the Crown and Parliament. Rather than "being based on a separation of powers between legislature, executive, and judiciary, to the extent that there is a separation of powers in English public law it is a separation between the Crown on one hand, and the Parliament on the other".[113] Tomkins opined that there is a *separation of power*; in contrast to Montesquieu's *separation of powers*.[114]

If this is the true separating and dividing of powers that is historically evident in the English 'state', it is a division of powers (or power) that predates the emergence of the Montesquieuian trinity by many centuries. In that sense, "the English constitutional order had already emerged before the radical genius of Montesquieu, Tom Paine, and James Madison had become available".[115] The emergence of a set of rights, preferences,

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112 M A Sieghart, *Government by Decree, A Comparative Study of the History of the Ordinance in English and French Law*, 9.

113 A Tomkins, *Public Law*, 44.

114 Ibid 46.

115 Ibid 45.

capacities and immunities of the Crown (which evolved into the modern day prerogative) is a more historically sound theory of the nature of the Crown, than Montesquieu's theory.

As a central or dominant organising principle for English public law, the "Crown vs Parliament" theory has much to commend it. It reconciles the establishment of the Crown and the emergence of the Parliament as the two defining public law institutions of the British Constitution. It recognises that the judicature is a function or activity of government, which was historically shared by the king and the Parliament. And it accounts for the centuries of constitutional struggle which can be summed up by the observation that the history of English public law is the history of the Parliament's limitations and restraint upon the prerogative.

A similar organising principle for English public law – whereby power in the English 'state' is effectively shared between the Crown and the legislature – was espoused by the Swiss-born lawyer Jean-Louis de Lolme. Writing in 1784, de Lolme offered the view that the point at which the "power of administering justice to individuals" became separated from the military power of the Sovereign is "the origin of a regular system of laws in a nation".[116] De Lolme positioned the "judicial authority" as a subset of the executive power. De Lolme wrote in his *Constitution of England* that the English king:[117]

> … assumed the prerogative of imposing taxes. He invested himself with the whole executive power of the government. But what was of the greatest consequence, he arrogated to himself the most extensive judicial power by the establishment of the court which was called *Aula Regis,* - a formidable tribunal, which received appeals from all the courts of the barons, and decided, in the last resort, on the estates, honour and lives of the barons themselves; and which, being wholly composed of the great officers of the crown, removable at the king's pleasure and having the kind himself for president, kept the first

116 J L de Lolme, *The Constitution of England*, 119.

117 Ibid 15 and 16.

> nobleman in the kingdom under the same control as the meanest subject.

Thus, having observed that the prerogative was historically understood by the leading writers of the time as a wider concept than the mere executive power (understood in a functionalist or administrative sense) of the Crown, one can see that this view remained the prevailing view until soon after Federation. Sir William Anson was able to say in 1907:[118]

> Of these three aspects of prerogative the most succinct and by far the most important are the customary rights, legislative and executive, which the Crown possesses in relation to Parliament, to the executive and to the Courts …

VI THE COMPETING DEFINITIONS OF 'THE PREROGATIVE'

Having set out the origin of scholarly enquiry into the quality of the English kingship, and having identified that the prerogative significantly predates the Montesquieuian doctrine of the separation of powers, it now falls to consider what the prerogative, royal prerogative, or prerogatives of the Crown are.

The academic literature on this question is significant. At its heart, there is a rather stale debate centred on reconciling, or approving, the two most oft-cited definitions of the prerogative, which are attributed to Blackstone and Dicey, and are canvassed below.

As has been already identified, the answer to the question, "what is the prerogative?", begins with Henry de Bracton, who said: "The king is prerogative".[119] During the time of Elizabeth I (in 1573), Sir William Staunford defined the prerogative as "a privilege or pre-eminence that any person hath before another, which as it is tolerable in some, so is it most to be permitted and allowed in a prince or sovereign government of a realm".[120]

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118 W R Anson, *The Law and Custom of the Constitution*, Vol II, 5.

119 F Pollock, F W Maitland, *History of English Law*, 496.

120 W Staunforde, *An Exposition of the King's Prerogative collected out of the great Abridgment of Justice Fitzherbert, and other old Writers of the Laws of England*, 1573, Ch I.

The first of the two "most often-quoted definitions of the royal prerogative"[121] was offered by Blackstone in his *Commentaries on the Laws of England*. He described the prerogative as "that special pre-eminence which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity".[122] "It signifies in its etymology, (from *prae* and *rogo*)", Blackstone said, "something that is required or demanded before, or in preference to, all others".[123] The prerogative's defining feature is that "it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradiction to others, and not to which he enjoys in common with any of his subjects"; Blackstone concludes that if "any one prerogative of the Crown could be held in common with the subject, it would cease to be prerogative any longer".[124] It has been suggested that Blackstone appropriated this definition from a writer a century earlier.[125] The most comprehensive taxonomy of the prerogatives of the Crown, Joseph Chitty's *Prerogatives of the Crown*, published in 1820, adopts Blackstone's description of the prerogative as correct law.[126] Blackstone's description has "the prerogative [as] a closed list of identifiable and discrete powers covering areas of government which are its especial province".[127] Indeed, a cursory examination of Chitty's *Treatise* is said to show that "there is no grand criterion

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121 B S Markesinis, "The Royal Prerogative Re-Visited", (1973) 32 *Cambridge Law Journal*, 287.

122 W Blackstone, *Commentaries*, Bk I, 232.

123 Ibid.

124 Ibid.

125 Blackstone's initial definition is almost identical to Cowell's, printed more than a century earlier (J Cowell, *The Interpreter or Booke Containing the Significations of Words* (facsimile of 1607 edn, 1970)): 'Prerogative of the King is that special power, pre-eminence, or privilege that the King hath in any kinde. Over and above the ordinarie course of the common law, in right of his crowne'. For this resemblance see Chrimes, "The Constitutional Ideas of Dr. John Cowell" (1949) 49 *Eng His Rev* 461; M Cohn, "Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive", (2005) 25 *Oxford Journal of Legal Studies*, 97, 104, fn 32.

126 J Chitty, *Prerogatives of the Crown*, 4.

127 A Tomkins, *Public Law*, 81.

or principle that encompasses the disparate powers and functions of the executive at common law".[128]

Blackstone's definition has found favour in the recent decisions of the High Court.[129] In *Cadia Holdings Pty Ltd v State of New South Wales*, four members of the Court said:[130]

> Blackstone described the prerogative as part of the common law of England but, given its nature, as being out of the ordinary course of the common law. The "prerogative" in the context of the present case concerns the enjoyment by the executive government of preferences, immunities and exceptions peculiar to it and denied to the citizen or, more specifically, of an exceptional right which partakes of the nature of property.

In *Williams [No 1]*, French CJ saw an attractive quality to Blackstone's definition when compared against the second of the two often-quoted definitions:[131]

> There is, nevertheless, a point to Blackstone's [definition]. It avoids the temptation to stretch the prerogative beyond its proper historical bounds. Moreover, as appears below, one of the Commonwealth submissions suggested that the exercise of the executive "capacities" was not subject to the same constraints as the exercise of the prerogative.

The second of the two definitions comes from Albert Venn Dicey's classic work, *An Introduction to the Study of the Law of the Constitution*, where Professor Dicey described the prerogative as "the residue of discretionary or arbitrary authority, which at any time is

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128 L Zines, "The inherent executive power of the Commonwealth", (2005) 16 *Public Law Review* 279.

129 *Davis v Commonwealth* (1988) 166 CLR 79, 107-109 (Brennan J); *Williams [No 1]* (2012) 248 CLR 156, 343-344 [488] (Crennan J).

130 (2010) 242 CLR 195, 223 [75] (Gummow, Hayne, Heydon and Crennan JJ).

131 *Williams [No 1]* (2012) 248 CLR 156, 185-186 [25].

legally left in the hands of the crown".[132] It is Dicey's broader description that has found favour in House of Lords and Privy Council case law in the last century.[133]

Blackstone and Dicey's definitions are, in truth, more descriptions than definitions. Indeed, it was acknowledged as early as 1680 that the prerogative can really only be described, rather than defined, by the prolific text-writer and Oxonian lawyer, John Brydall.[134] Blackstone and Dicey's "definitions" are unsatisfactory because of their vagueness. Frederic Maitland said in 1919 that the "law then as to the extent of the royal prerogative in many directions is often very vague".[135]

Despite their vagueness, some features of these two definitions need to be emphasised. First, the Blackstone and Dicey definitions are descriptive in nature, and not functionalist. They are both posited as concepts to be understood *in contradistinction* to one another; that is, what they are not. And second, they both necessitate an informed (and necessarily historical) analysis to determine what falls within the definition and what falls outside the definition.[136] It would be constitutional heresy to suggest that the prerogatives of the Crown could expand. As Diplock LJ famously said in *British Broadcasting Corporation v Johns*:[137]

> ... it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints upon the citizens of the United Kingdom without any statutory authority are well settled and incapable of extension.

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132 A V Dicey, *An Introduction to the Study of the Law of the Constitution*, 1889, Third Edition, 348.

133 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 99; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398, 407, and 416; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [No 2]* [2009] 1 AC 453, 590 [69] (Lord Bingham), 516 [141] (Lord Mance).

134 J Brydall, *His Majesties Royal Rights and Prerogatives Asserted, Against Papal Usurpations, and all other Anti-Monarchical Attempts and Practices*, 1.

135 F W Maitland, *The Constitutional History of England*, 343.

136 *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75, 101 (Lord Reid).

137 [1965] Ch 32, 79.

Citing *British Broadcasting Corporation v Johns*, Bingham LJ made it plain that "[o]ver the centuries the scope of the royal prerogative has been steadily eroded and it cannot today be enlarged".[138] Ascertaining what falls within the ambit of the prerogative requires historical analysis. Again, his Lordship opined, "when the existence or effect of the royal prerogative is in question the courts must conduct an historical inquiry to establish whether there is any precedent for the exercise of the power in the given circumstances".[139] Lord Reid made the same point in *Burmah Oil Company Ltd v Lord Advocate*,[140] where his Lordship said:[141]

> The prerogative is really a relic of a past age, not lost by disuse, but only available for a use not conceded by statute. So I would think the proper approach is a historical one: how was it used in former times and how has it been used in modern times?

Sir William Wade said that the prerogative is "a bundle of miscellaneous powers and rights which are inherent in the Crown and in no one else".[142] Perhaps the best description that can be made about the prerogative is that: "The defining characteristic of the prerogative is that its exercise does not require the approval of Parliament".[143] To search for an analytical description, or an organising principle, which explains what the various prerogatives have in common (other than belonging to the Crown, and not requiring the approval of Parliament) is a barren exercise. As the late Professor Leslie Zines wrote, "there is no

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138 *Bancoult [No 2]* [2009] 1 AC 453, 490 [69].

139 *Bancoult [No 2]* [2009] 1 AC 453, 490-491 [69].

140 [1965] AC 75, 101.

141 [1965] AC 75, 101; approved in *Bancoult [No 2]* [2009] 1 AC 453, 491 [69] (Lord Bingham); at 519 [149] (Lord Mance).

142 W Wade, "Procedure and Prerogative in Public Law", (1985) 101 L.Q.R. 180, 191.

143 T Poole, "United Kingdom: The royal prerogative", (2010) 8 *International Journal of Constitutional Law,* 146.

grand criterion or principle that encompasses the disparate powers and functions of the executive at common law".[144]

VII THE PREROGATIVE IS WIDER THAN THE EXECUTIVE POWER

The foundation of this dissertation is an historically accurate understanding of the nature of the prerogative of the Crown, and the doctrinal emergence of what became known as the "executive prerogatives", or the "executive power" of the Crown, as a species of the prerogative in British constitutional history. Evidence for this view can be drawn from Blackstone, Chitty, and Hallam, and from some of the leading constitutional scholars of the British Empire.

William Blackstone dissected the prerogative into the "direct" and "indirect" prerogatives. The direct prerogatives are further divided, he said, into those prerogatives relating to the royal "character", those prerogatives relating to the royal "authority", and those prerogatives relating to the royal "income" or "revenue". Having considered those aspects of the prerogative that touch upon the royal character, Blackstone then turned to royal authority, and set out:[145]

> … those *branches of the royal prerogative*, which invest this our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers; *in the exertion whereof consists the executive part of government*. This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength and dispatch.

Blackstone's use of the words "in the exertion whereof consists the executive part of government", suggests that the exertion (or performance of) those authorities and powers consists of what is now described as the executive government. This suggests that those

144 L Zines, "The inherent executive power of the Commonwealth", (2005) 16 *Public Law Review* 279.

145 W Blackstone, *Commentaries*, Bk I, 242 (emphasis added).

prerogatives (and only those prerogatives) fall within what might be described as the executive prerogatives as they pertain to the executive part of government. That Blackstone's description of the prerogative divides the prerogative into a sub-class called the "royal authority", or "royal power", and of that sub-class, the exercise of it "consists of the executive part of government" suggests that the prerogatives of the Crown are wider than that power which is now described as the "executive power" of the Crown.

This conclusion as to the nature of Blackstone's taxonomy of the prerogative finds further textual support when, in introducing the subsequent chapter on the king's revenue prerogatives in his *Commentaries*, Blackstone noted that "in the preceding chapter, [he] considered … those branches of the king's prerogative, which contribute to his royal dignity, and constitute the executive power of the government".[146] He then proceeded to examine another branch of the king's prerogative; the king's fiscal prerogative.

In fact, a wider view of how Blackstone structured his *Commentaries* is useful in ascertaining the relationship between the prerogative and the executive power. In his chapter "Of the Parliament", Blackstone wrote:[147]

> In all tyrannical governments the supreme magistracy, or the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may take care not to entrust the latter with so large a power, as may tend to the subversion of it's [sic] own independence, and therewith of the liberty of the subject. With

146 Ibid 271.
147 Ibid 142-143.

> us therefore in England this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone. It will be the business of this chapter to consider the British parliament; in which the legislative power, and (of course) the supreme and absolute authority of the state, is vested by our constitution.

Blackstone (consistent with some of the writers identified *supra*) viewed "supreme power" as being divided into two branches: "legislative power" vested in the parliament, which consisted of the "king, lords, and commons"; and "executive power" vested in "the king alone". In his chapter entitled "Of the King, and His Title", Blackstone affirmed that the "Supreme executive power of these kingdoms" is vested in "the king or queen".[148]

Again, at the commencement of his chapter entitled "Of Subordinate Magistrates", we see Blackstone's scheme for seeing two great powers. He wrote:[149]

> In a former chapter of these commentaries we distinguished magistrates into two kinds; supreme, or those in whom the sovereign power of the state resides; and subordinate, or those who act in an inferior secondary sphere. We have hitherto considered the former kind only, namely, the supreme legislative power or parliament, and the supreme executive power, which is the king: and are now to proceed to enquire into the rights and duties of the principal subordinate magistrates.

Blackstone went on to say that, when setting out the powers and duties of the "subordinate magistrates" that he won't, at that point, "treat of the office and authority of the lord chancellor, or the other judges of the superior courts of justice, because they will find a

148 Ibid 183.
149 Ibid 327.

more proper place in the third part of these commentaries". Nonetheless, Blackstone clearly grouped together the judges (including sheriffs, coroners, justices of the peace, constables, etc.) within the overarching category of "subordinate magistrates".

At the same time as Blackstone published his Oxford lectures, the Royal Professor of Common Law at the University of Dublin wrote of "the nature and constitution of a feudal monarchy", the "constituent parts thereof, and what were the chief of the peculiar rights and privileges of each part". Commencing with a general description of the "splendour of his royalty",[150] Dr Sullivan wrote of some of the powers and immunities of the king – for example, the "sacred, and guarded" nature of the king's person, resulting in "the most horrible punishment for attempts against him" – and then said:[151]

> But the greatest of the kingly power consisted in his being entirely entrusted with the executive part of the government, both at home and abroad. At home justice was administered in his name, and by officers of his appointment.

Dr Sullivan's use of the words "the greatest" (by a writer who was very familiar with the writings of Montesquieu)[152] suggests that of the kingly power, that part which can be described as "the executive part of government", is best understood as a part of, but not the sum of, the kingly power.

Joseph Chitty's *Prerogatives of the Crown* is the leading academic work on the content of the Crown's prerogative in the nineteenth-century British Empire. Published in 1820, it

150 F S Sullivan, *Lectures on the Constitution and Laws of England*, 235.

151 Ibid.

152 Ibid 245. Dr Sullivan's familiarity with Montesquieu's *De l'esprit des lois* invites the inference that he was aware of Montesquieu's trinity of legislative, executive and judicial powers, and has not correlated the 'executive part of government' to what Montesquieu described as the 'executive power'.

is still widely cited in both British[153] and Australian[154] courts as an authoritative exposition on the nature and content of the prerogative.

Chitty made the point that the king's powers are wider than merely "executive" when he wrote of the interconnectedness between the king's "legislative prerogatives" and the king's "executive prerogatives". He said at the commencement of his *Prerogatives of the Crown*:[155]

> The rights of sovereignty, or supreme power, are of a legislative and executive nature, and must, under any form of government, be vested exclusively in a body or bodies, distinct from the people at large. In this country, the legislative and executive authorities are wisely placed in different hands: the power of making laws being allotted to the King, Lords and Commons, who constitute the Parliament; and the right to administer and execute them being assigned to the King, who in his political capacity of supreme executive magistrate, must in general consider the laws, not his own will, as the criterion of his conduct. That government is arbitrary in which the legislative and executive departments are inseparable; but when firmly and inalienably secured in separate hands, the different branches of government operate as a check on each other, and form that

153 *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 135 (Lord Hodson), at 145-146 (Lord Pearce); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398 (Lord Fraser); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453, 491 [70] (Lord Bingham), at 520 [151] (Lord Mance); *Sharma & Ors v Attorney General of Trinidad and Tobago (Trinidad & Tobago)* [2009] UKPC 37 [30] (Lord Hope); *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [97] (Lord Mance).

154 *Williams [No 1]* (2012) 248 CLR 156, 185-186 [25] (French CJ); *Joseph v Colonial Treasurer (NSW)* (1918) 25 CLR 32, 48 (Isaacs, Powers and Rich JJ); *Tate v Haskins* (1935) 53 CLR 594, 607-608 (Rich, Dixon, Evatt and McTiernan JJ); *Downs v Williams* (1971) 126 CLR 61, 77 and 83 (Windeyer J); *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 218 (Mason J); *Commonwealth v Mewett* (1997) 191 CLR 471, 544 (Gummow and Kirby JJ); *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, 432-433 [125] (McHugh J); *Commonwealth v Yarmirr* (2001) 208 CLR 1, 101-102 [212] (McHugh J); *Pape* (2009) 238 CLR 1, 37 [55] (French CJ), at 79-79 [199] (Gummow, Crennan and Bell JJ); *Cadia Holdings Pty Ltd v State of New South Wales* (2010) 242 CLR 195, 204 [13] and 206-207 [21] (French CJ).

155 J Chitty, *Prerogatives of the Crown*, 2.

> mixed monarchical constitution which has been considered by most writers on political subjects to be best calculated to secure the happiness and liberty of the subject.

Chitty went further. He made it clear at the start of his Chapter VII, which is entitled "Of the King as the Fountain of Justice and Office, and Administrator of the Laws", that:[156]

> The prerogative of creating courts and officers has been immemorially exercised by the Kings of England, and is founded on the capacities of executive magistrate, and distributor of justice, which the constitution of the country has assigned to the Sovereign.

Chitty went on to describe public offices as "either judicial or ministerial".[157] As to "public offices merely of a ministerial nature", Chitty observed that though "his Majesty cannot execute them himself", he "has an undoubted prerogative right to appoint officers to fill them".[158] Chitty described the King's power to constitute new ministerial offices, and appoint persons to them. He advised that "it is not in the power of the Crown to create any new office inconsistent with the constitution or prejudicial to the subject".[159] Chitty's description of ministerial office, and contrasting it against judicial office, leaves the reader of his *Prerogatives* with the distinct impression that Chitty saw the ministerial office as one type of administrator, or executor, of the law, and "instituted … for the benefit of the State".[160]

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156 Ibid 75.
157 Ibid 80.
158 Ibid.
159 Ibid.
160 Ibid 83.

Support for the proposition that the executive power and the prerogative are not correlative, and that a substantial part of the executive power is part of, and not the sum of, the prerogative can also be found in the elegant writings of the noted Whig constitutional historian (and early nineteenth century barrister), Dr Henry Hallam. He wrote in 1818:[161]

> The word prerogative is of peculiar import and scarcely understood by those who come from the studies of political philosophy. *We cannot define it by any theory of executive functions. All these may be comprehended in it, but also a great deal more.* It is best, perhaps, to be understood by its derivation; and has been said to be that law in case of the king, which is law in no case of the subject.

Walter Bagehot published his *The English Constitution* in the English press in 1867. Dr John Quick and Robert Garran told us in their *Annotated Constitution of the Australian Commonwealth* that they were indebted to Bagehot for his *Constitution* for providing "valuable assistance".[162] We know that some of the delegates to the Constitutional Conventions of the 1890s were also familiar with the words of Bagehot;[163] in fact, Sir George Reid quoted Bagehot at length in the debate concerning draft s 2 of the Commonwealth Bill, during the Second Convention in Adelaide.[164] Bagehot told us at the start of his second chapter on "The Monarchy", that:[165]

> … the ancient theory holds that the Queen is the executive. The American

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161 H Hallam, *View of the State of Europe during the Middle Ages*, 546-547 (emphasis added).

162 J Quick, R R Garran, *The Annotated Constitution of the Australian Commonwealth*, ix.

163 *Con. Deb. Syd, 1891*, 543, (Sir Richard Baker); *Con. Deb. Adel, 1897*, 912, (George Reid), at 785 (Sir Richard Baker); *Con. Deb. Melb, 1898*, 2183 (Isaac Isaacs), at 2195 (Bernard Wise); *Con. Deb. Melb, 1898*, 758 (Patrick Glynn).

164 *Con. Deb. Adel, 1897*, 912. This aspect of the Debates considered the difference between the prerogatives of the Crown, and the "executive power and authority".

165 W Bagehot, *The English Constitution*, 51.

> Constitution was made upon a most careful argument, and most of the argument assumes the king to be the administrator of the English Constitution …

Turning to the early post-Federation literature; soon after Federation, William Harrison Moore published his work *The Constitution of the Commonwealth of Australia*. In his chapter on the executive power and the organisation of the executive government, Harrison Moore described the work of the executive as "the execution of the law",[166] and adopted the terms "administrative", "stewardship", or "management" of government to describe that type of function or activity which provides for "controlling the management of the state affairs".[167] It is plain that in that chapter, the sense in which Harrison Moore used the term "executive power" is in the Montesquieuian sense. Harrison Moore went on to say that:[168]

> The executive power in every part of the Queen's dominions *is part of* the prerogative, and therefore section 61, so far as it vests generally the executive power of the Commonwealth in the Crown, is merely declaratory of the common law.

Quick and Garran in their *Annotated Constitution of the Australian Commonwealth* took the view that "the exercise of the ordinary Executive authority by the Crown, through Ministers of State" is an example of a "prerogative".[169]

In the first edition of his *Laws of England*, the Earl of Halsbury, made it clear: "The executive authority is vested in the Crown *as part of the* prerogative".[170] Under the

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166 W Harrison Moore, *The Constitution of the Commonwealth of Australia*, 211.

167 Ibid 212.

168 Ibid 219 (emphasis added). Section 61 refers to s 61 of the Constitution, which vests the executive power of the Commonwealth in the Queen.

169 J Quick, R R Garran, *The Annotated Constitution of the Australian Commonwealth,* 322.

170 Halsbury, *Laws of England*, Vol 6, 1909, 318 (emphasis added).

heading "The Executive", Lord Halsbury adopted the division of "special privileges" assigned to the Sovereign by Blackstone; the special qualities of 'pre-eminence and dignity'; the "various powers and authorities", afforded to the sovereign "as the supreme executive officer in the State"; and the "special privileges enjoyed by the sovereign".[171] Dr Evatt agreed. He said that "the executive authority under the British system of government is vested in the King and exercised *by virtue of the Prerogative* on the advice of Ministers".[172] So too did William Holdsworth, who told us that the king's "prerogative was the source of the executive authority in the state …".[173]

In his first edition of his *Responsible Government in the Dominions*, Arthur Berriedale Keith identified the same distinction between the prerogative and executive power; namely that the "executive power" is a component of, and not correlative to the full sum of the prerogatives of the Crown. In a footnote (which was also noticed by Dr Evatt),[174] Berriedale Keith observed that:[175]

> The prerogative and executive power are sometimes used as convertible terms (e.g. by Barton, *Melbourne Federal Debates*, pp. 2253, 2254: Quick and Garran, *Constitution of Commonwealth*, p. 406; cf pp. 472, 707; and the Ontario Government, Sess. Pap., 1888, No. 37); sometimes the prerogative is restricted to the discretionary power of the Crown as opposed to power regulated or granted by statute. Cf . Anson, *Law of the Constitution*, II I. 3; Dicey, *Law of the Constitution*, pp.420 seq, In any case, prerogative means more than executive power, for there is a judicial prerogative and a legislative prerogative also. A Governor has a full delegation of executive authority as regulated or granted by

171 Ibid 372-373.

172 H V Evatt, *The Royal Prerogative*, 1987, 36 (original emphasis).

173 W S Holdsworth, "The Prerogative in the Sixteenth Century", (1921) *Columbia Law Review*, Vol 21, No. 6, 554, 555.

174 H V Evatt, *The Royal Prerogative*, 12.

175 A Berriedale Keith, *Responsible Government in the Dominions*, Vol II, 664, at fn 2.

statute, but not necessarily of other executive authority.

Notably, Berriedale Keith's last sentence drew a distinction between the power that a governor is delegated by statute (for example, by section 61 of the executive power of the Commonwealth in the Queen), and "other executive authority". By "other executive authority", Keith appeared to be endorsing the view that there is a specie or species of "executive authority" which is commonly associated with, or connected to, the executive government.

There is further support for the proposition that the executive power and the prerogative are not correlative (and that the executive power should be understood in a functionalist sense, akin to "administering" and "enforcing" of laws) in the writings of the celebrated legal historian, Frederic Maitland.

Maitland questioned the assumption that the executive power and the prerogative were one and the same in 1919. In his *Constitutional History of England*, Maitland challenged the accuracy of the assertion that "the executive power is vested in the king alone, and consists of the royal prerogative". He said that "[n]ow most people know that this is not altogether true to fact".[176] After making the point that the powers attributed to the king "are really executed by the king's ministers, and that the king is expected to have ministers who command the confidence of the House of Commons"[177] whilst recognising this as a rule of "constitutional morality", he observed that "most people" would say "that *legally* the executive power is in the king, though constitutionally it must be exercised by ministers".[178] But, according to Maitland, "this old doctrine is not even true to law", explaining that "England is now ruled by means of statutory powers which are not in any sense […] the powers of the king".[179] Maitland gave two examples:[180]

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176 F W Maitland, *The Constitutional History of England*, 415.
177 Ibid.
178 Ibid.
179 Ibid.

> Look at the police force, that most powerful engine of government. That force was gradually created by means of a series of statutes ranging from 1829 to 1856. To some extent it was placed under the control of local authorities, of the justices of the peace in the counties, of watch committees in the boroughs: but a power of issuing rules for the government was given – to whom? not to the queen, but to one of H.M. principal Secretaries of State, which means in practice the Home Secretary. It is not for the queen to make such regulations: it is for the Secretary. So as to the administration of the poor law. In 1834, when the law was remodelled, a central authority was created with a large power of issuing rules, orders and regulations as to the relief of the poor. This power was given, not to the king, but to certain poor law commissioners, and it has since been transferred to the Local Government Board.

Therefore, Maitland arrived at the conclusion:[181]

> In my view […] we can no longer say that the executive power is vested in the king: the king has powers, this minister has powers, and that minister has powers.

And Maitland warned:[182]

> If you are told that the crown has this power or that power, do not be content until you know who legally has the power – is it the king, is it one of his secretaries: is this power a prerogative power or is it the outcome of statute?

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180 Ibid.
181 Ibid 417.
182 Ibid 418.

In this sense Maitland challenged the utility of that "great phrase" that "the executive power is in the king and is exercised by the ministry".[183] Earlier in his *History*, in describing the "executive power", Maitland said:[184]

> … the executive or administrative or governmental power was the king's. You will be familiar with such terms as these, they pass current in modern political life and of course they have a meaning. When we have marked off the work of legislation, the imposing of general laws upon the community, and also the work of judicature, the hearing and determining criminal charges and civil actions, there yet remains a large sphere of action, which we indicate by such terms as these. *Governmental* seems to me the best of these terms; *executive* and *administrative* suggest that the work in question consists merely in executing or administrating the law, in putting the laws in force. But in truth a great deal remains to be done beyond putting the laws in force – no nation can be governed entirely by general rules. We can see this very plainly in our own day – but it is quite as true of the Middle Ages: - there must be rulers or officers who have discretionary powers, discretionary coercive powers, power to do or leave undone, power to command that this or that be done or left undone. The law marks out their spheres of action, the law (as we think) gives them their powers.

That Maitland described the executive power in a Montesquieuian sense – that is in a functionalist sense – and then further into his *History*, opined "with some diffidence" that the constitutional principle that the executive power is vested in the king is no longer a truism (because of the growth of the administrative state, vesting administrative powers in

183 Ibid 430.
184 Ibid 196.

officials other than the sovereign) evinces that Maitland drew a distinction between executive power and the prerogative.

The executive power, Maitland reserved for that power described above; the prerogative, is the collection of powers, capacities and immunities that he set out prerogative-by-prerogative in his *History*. One way of reading Maitland's *History* is that he appeared to hold the view that the executive power is shared by the king with his ministers, and other public officials; but that the prerogative power remained vested in the king. A similar point about the executive power was made by Dr Evatt in his thesis.[185]

In modern British case law there is some judicial acceptance of the view that there is a difference between the prerogative and the power to execute the law. In *Burmah Oil*, Viscount Radcliffe asked: "What, then, do we mean by the prerogative …?"[186] He answered his own question by saying that in "our history the prerogatives of the Crown have been many and various, and it would not be possible to embrace them under a single description". He went on to describe some of them as "beneficial or sources of profit to the Crown". Others, he said "were as much duties as rights and were vested in the Sovereign as the leader of the people *and the chief executive instrument* for protecting the public safety".[187] After identifying John Locke's description of the prerogative in *True End of Civil Government*, his Lordship continued, saying that:[188]

> The essence of a prerogative power, if one follows out Locke's thought, is not merely to administer the existing law – there is no need for any prerogative to execute the law – but to act for the public good, where there is no law, or even to dispense with or override the law where the ultimate preservation of society is in question.

185 H V Evatt, *The Royal Prerogative*, 37.
186 [1965] AC 75, 114.
187 [1965] AC 75, 115 (emphasis added).
188 [1965] AC 75, 118.

The true relationship between the prerogative, and the concept or species of power described as executive power is the same as that between a steam train and its carriages – (putting aside executive power conferred by statute) one is the whole, and the other is merely part, or subset, thereof, albeit a very substantial part thereof. The two terms are not correlative. There is considerable support for the proposition that the power to execute the law, or that power to execute, complete, or administer the law (again, putting aside executive power conferred by statute) is a discrete part of the prerogative of the Crown, and is not the sum of the prerogative.

The fact that the prerogative is the sum of more than just the administering and enforcing arm of government is further illustrated by the recognition of what are sometimes referred to as the non-executive prerogatives. Writing for his doctorate, H V Evatt opined that the prerogatives of the Crown could be collected together into three groups. First, there were "executive prerogatives", or "executive powers". Second, there were "immunities and preferences", and third, there were "proprietary rights". He said of these two last categories of prerogatives respectively:[189]

> In the second place, a number of the Prerogatives are essentially different in character. They are negative in the sense that they do not connote isolated and occasional action on the part of the King. They refer more to permanent and continuous characters and capacities of the Monarch existing independent of time, place and circumstance. Thus, the King is entitled to be paid as against a debtor, before all other creditors. Does this involve any action? No doubt, the Prerogative must be *claimed* in order to be effective but it is closely related to the continuing and permanent principle that the King is immune from the

189 H V Evatt, *The Royal Prerogative*, 31; *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 320-322 (Evatt J); *Williams [No 1]* (2012) 248 CLR 156, 227-228 [123] (Gummow and Bell JJ).

> ordinary process of his Courts. Similarly, apart from statute, he cannot be mulct in costs. He cannot be compelled to give discovery. It is accepted law that he is not bound by statutes except under certain circumstances and conditions. All these powers and rights of the King are in the nature of immunities and preferences. They are not in the nature of Executive powers nor are they in the nature of rights of property.
>
> In the third place, certain Prerogatives are clearly in the nature of property. For instance, the right to escheats, the Prerogative right to gold and silver mines, the right to treasure trove, and the right to Royal fish, ownership of the foreshores and of the bed of the ocean within territorial limits – all these and such like Prerogatives, including, for instance, the ownership of lands in a new Colony, are ordinary rights of property against all the world.
>
> It would seem, therefore, that for practical purposes all the Prerogatives of the King can be divided into executive powers, certain immunities and preferences, and proprietary rights.

Again, the very acknowledgment that there are prerogatives which cannot be classified, or at least cannot be easily classified, as "executive powers", evinces that the prerogatives of the Crown are a wider set of rights, preferences, capacities and immunities than can be adequately caught within the meaning of "executive power". As Dr Evatt concluded further in his *Royal Prerogative*:[190]

> Executive power and Prerogative are therefore not synonymous or interchangeable terms, and it is submitted that the analysis already made of the

190 H V Evatt, *The Royal Prerogative*, 37.

> classification of the Prerogatives of the King properly allows to the Prerogative a distinct if not entirely separate sphere from that of executive power.

In summary, the point of this part of this Chapter has been to demonstrate that when French J, then sitting in the Full Court of the Federal Court, said that: "The executive power of the Commonwealth under s 61 cannot be treated as a species of the royal prerogative",[191] his Honour was, respectfully, incorrect – at least when the relationship between the prerogative and the executive power is understood against the backdrop of the writings of the learned authors, and the historical record.

VIII THE WIDTH OF THE PREROGATIVE IN THE COLONIES

If the identification of prerogatives of the Crown which are wider than those prerogatives described as "executive" is insufficient to illustrate the point that a part of the executive power is a sub-species of the prerogative, then the point is further made by an examination of the Sovereign's colonial powers. The prerogative runs throughout all the Queen's common law dominions unless excluded by statute.[192] As Churchill said of the American colonies, "[t]he Royal Prerogative, so drastically modified in England after the Revolution of 1688, still flourished in the New World".[193]

The reception of the prerogative into the Australian colonial setting provides a useful illustration as to why the prerogatives of the Crown and the executive power of the Crown are not correlative of one another. Whilst the prerogative may be erroneously interchanged with a less than precise use of the words "executive power" in English constitutional practice, the accepted powers of the Crown in the Australian colonies (prior to the establishment of self-government) demonstrates that the exercise of the prerogative was

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191 (2001) 110 FCR 491, 540 [183] (French J).

192 *Exchange Bank of Canada v R* (1886) 11 App Cas 157.

193 W S Churchill (editor), W S Churchill's *The Great Republic: A History of America*, 40.

significantly wider in the colonial setting than in England. The late Dr Bruce McPherson wrote in his magisterial *The Reception of English Law Abroad*:[194]

> … the royal prerogatives of and incidental to government are, except where limited by local statute, as extensive in the colonies as they are at common law in England.[195] In administering colonial governments and in reviewing colonial legislation in the old empire before 1776, it was a pressing concern of the imperial [C]rown and its officers to ensure that the colonial prerogatives of the [C]rown were not diminished or compromised. Whether Parliamentary enactments like the Habeas Corpus Act 1679 or the Bill of Rights 1689 limited royal prerogatives in the overseas possession as they did in England was for some time a matter of contention between the [C]rown and colonists.

Dr McPherson identified Lord Wensleydale's words from *Kielley v Carson*[196] as good law. Speaking for the Board, Baron Parke said in 1842:[197]

> … there is no doubt that the settlers from the mother-country carried with them such portion of its common and statute law as was applicable to their new situation, and also the rights and immunities of British subjects. Their descendants have, on the one hand, the same laws and the same rights, unless they have been altered by parliament; and on the other hand, the Crown

194 B H McPherson, *The Reception of English Law Abroad*, 98-99.

195 *Kielley v Carson* (1842) 4 Moo PC 63, 84; 13 ER 225, 233. *Solicitor-General, ex p Cargill v City of Dunedin* (1875) 1 NZ Jur NS 1, 14. *Liquidators of Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC 437, 441. See also *Re Bateman's Trust* (1873) 15 Eq 355, 361. *R v Bank of Nova Scotia* (1886) 11 SCR 1, 18.

196 (1842) 4 Moo PC 63, 84; 13 ER 225

197 (1842) 13 ER 225, 233 (Lord Lynhurst LC, Lord Brougham, Lord Denman, Lord Abinger, Lord Cottenham, Lord Campbell, Sir Lancelot Shadwell VC, Sir Nicholas Tindal CJ, Baron Parke, Erskine J and Dr Lushington).

> possesses the same prerogative and the same powers of government that it does over its other subjects.

The breadth of the Imperial Crown's prerogative to govern (prior to the establishment of self-government), spanning as it did, legislative, executive and judicial functions in the colonies (at least in conquered or ceded colonies),[198] was further described by Dr McPherson:[199]

> While having no general power independently of Parliament to legislate for settled colonies,[200] the [C]rown was regarded as competent in the exercise of its prerogative to authorise the establishment of English settlements abroad and to invest them with a form of government which included an elected legislative assembly.[201] … Early charters did not differentiate between legislative, executive and judicial functions of government, but ran all three of them together in the form of a single power to "correct, punish, pardon, govern and rule ... all our subjects and others" inhabiting the newly settled lands, and to do so "according to such statutes, laws and ordinances" as were established by the promoters of the settlement. This formula for colonial government, first embodied in the charter granted to Sir Humphrey Gilbert of 1578,[202] owed much of its language to the terms of earlier and contemporary letters patent issued to companies formed to foster overseas trade[203] or granted to

198 *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045 (Lord Mansfield CJ).

199 B H McPherson, *The Reception of English Law Abroad*, 106-107; see also *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 34-38 (Brennan J), and 79-80 (Deane and Gaudron JJ).

200 (1951) 25 ALJ 59 (W B Campbell). Compare (1964) 50 Jnl RAHS 161 (E A Campbell).

201 *Phillips v Eyre* (1870) LR 6 QB 1, 18-19.

202 1 Thorpe 49, 51.

203 Smith, *Development of Legal Institutions*, 427-428. St Paul 1965. P Griffiths, *A Licence to Trade*, 22-23. London 1974. 1 M & F 15-19.

> communities of English merchants trading and residing in foreign countries.[204]

Indeed, this remains the orthodox view in Britain today. As Lord Hoffman pointed out in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*,[205] the "law is stated in *Halsbury's Laws of England*", and:[206]

> In a conquered or ceded colony the Crown, by virtue of the prerogative, has full power to establish such executive, legislative and judicial arrangements as the Crown thinks fit, and generally to act both executively and legislatively, provided the provisions made by the Crown do not contravene any Act of Parliament extending to the colony or to all British possessions. The Crown's legislative and constituent powers are exercisable by Order in Council, Letters Patent or Proclamation …

The breadth of the Crown's powers and functions in the Empire's colonies has been judicially recognised. As Renfree set out in his *Executive Power,*[207] it was the rule of the common law that English law, so far as applicable, applied to each colony. This had the result that, subject to any charter granted to the colonists, the Queen's prerogatives in the colony were precisely those prerogatives which she could exercise in "the mother

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204 Letters patent to English merchants in Holland, 1407 ("by common consent of ... our subjects to make ... ordinances ... for the better government ... of our subjects"), in Lucas, *The Beginnings of Overseas Enterprise*, 184, 186 (Oxford 1917). Charter for Muscovy Company, 1555; 1 M & F 229, 231. Charter for a Guinea Company, 1588; 1 M & F 233.

205 [2009] 1 AC 453, referring to the Fourth Edition reissue of *Halsbury's Laws of England*, Vol 6 (2003), paragraph 823.

206 [2009] 1 AC 453, 482 [31], and citing (at [32]) authority for these propositions as Lord Mansfield's judgment in *Campbell v Hall* (1774) 1 Cowp 204, 211; see also at *Bancoult* [2009] 1 AC 453, 495 [81] (Lord Rodger of Earlsferry), and 508 [124] (Lord Carswell).

207 H E Renfree, *The Executive Power of the Commonwealth of Australia*, 404.

country";[208] or, as was said by Lord Westbury LC in the case of *Re Lord Bishop of Natal*:[209]

> After a colony or settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that colony or settlement as it does to the United Kingdom.

Therefore, in the Australian context, as in other colonies, once the Crown established municipal legislatures and courts in a colony, the prerogative of the Crown to further exercise legislative and judicial authority was extinguished; and the superintendence of the legislative and judicial authority in a colony was a matter for the Imperial Parliament.

The breadth of the prerogative (prior to the establishment of self-government) in so far as it permitted the Crown to exercise legislative, executive and judicial functions in the colonies demonstrates why, in an Australian context, the prerogative was wider than what might be simply styled as the executive prerogatives. The very acknowledgement of the former validity of legislative and judicial prerogatives in the colonial setting weighs against a construction that the expression "executive power of the Commonwealth" in s 61 of the Constitution should be construed as vesting in the Queen all those prerogatives that Queen Victoria enjoyed with respect to Her Australian colonies before the enactment of Imperial legislation – and particularly, the Constitution. It rather makes the opposite point. The acknowledged previous breadth of the prerogative in the colonial setting (including, as it did, powers which are more aptly characterised as legislative and judicial in nature) renders the choice of the word "executive" within the expression "executive power of the Commonwealth", to mean something less than the prerogatives of the Crown generally recognised to appertain to the Queen in the closing years of the eighteenth century.

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208 J Chitty, *Prerogatives of the Crown*, 32.

209 [1865] 3 Moo. P.C. 115, 148; see also *Liquidators of the Maritime Bank of Canada v The Receiver-General of New Brunswick* [1892] AC 437, 441; *Attorney-General for New South Wales v. Butterworth & Co (Aust.) Ltd* (1938) 38 S.R. (N.S.W.) 195, 238.

IX THE COMMON LAW EXECUTIVE POWER

As has been demonstrated *supra*, at common law the initial exercise in the Crown's colonies of the king's prerogative of legislative power and judicial power, are both vested in the Crown – that is, the common law recognises that the powers to legislate and adjudicate, are vested in the Queen, and exercisable by the Crown until such time as the Imperial Parliament legislates to vest the colonial legislative and judicial powers in other entities, such as a colonial parliament. That being so, it should be uncontroversial that the Crown has a correlative function (and therefore power), recognised at common law, to execute, or administer, those laws that the Queen has enacted for her colony or dominion – a *common law executive power*. As William Harrison Moore wrote, the common law is the source of the rule that "[t]he executive power in every part of the Queen's dominions is part of the prerogative …".[210] Executive power emanating from the common law (or more precisely, recognised by the common law) can conveniently be described as *common law executive power*.

In a colony, all public power, unless or until vested in another entity (such as a colonial governor), is vested in the Crown, until such time as it is delegated, or invested in that entity. What, therefore, is the criterion for what part of the executive power has been delegated to the governor? In 1820, Chitty wrote that "[t]he governor … derives his power from, and is substantially a mere servant or deputy of the Crown, appointed by commission under the great seal". He continued: "The criterion for his rules of conduct are the King's instructions, under the sign manual".[211] The leading decision of the Judicial Committee of the Privy Council was that of *Musgrave v Pulido*.[212] In that case, the then governor of Jamaica sought to plead (in defence of the seizure and detention of the vessel, *Florence*), that he acted "in reasonable exercise of his discretion and that the action taken was an act of state". In rejecting this plea, Sir Montague Smith approved the dictum of Lord

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210 W Harrison Moore, *The Constitution of the Commonwealth of Australia*, 219.

211 J Chitty, *Prerogatives of the Crown*, 34.

212 (1879) 5 App. Cas. 102.

Broughton in *Hill v Bigge* where his Lordship described a colonial governor as "having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him".[213] Sir Montague went on to say in *Musgrave v Pulido* that:[214]

> … the Governor of a colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of state.

In opining that "a Governor has no special privilege like that of the Crown", the commentator on Imperial constitutional law, Arthur Berriedale Keith, summarised that "… apart from statutory powers, the Governor has a delegation of so much of the executive power as enables him effectively to conduct the Executive Government of the territory".[215] His statement that "the Governor has a delegation of so much of the royal prerogative as is required for the conduct of the executive government of the Dominion or State" in *Imperial Unity and the Dominions* is consistent with the view that the executive power is a species of the prerogative.[216]

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213 (1841) 3 Moore, P.C., 464; see (1879) 5 App. Cas. 102., at 107 (Sir Montague Smith).

214 (1879) 5 App. Cas. 102., at 111.

215 A Berriedale Keith, *Responsible Government in the Dominions*, 84.

216 A Berriedale Keith, *Imperial Unity and the Dominions*, 52.

This is a narrowly cast proposition. In concluding that the prerogative permits the delegation of an executive power, and that executive power is limited to doing acts which enable a governor to "conduct the Executive Government of the territory", Berriedale Keith limited that power to matters pertaining to the administration of "the Executive Government"; and, presumably, not to matters that go beyond the administration of the executive government – which he saw as including "practically all the prerogatives of the Crown in the United Kingdom".[217]

It is important to note two aspects. First, the common law authority of a governor to administer the executive government of a territory flows *from the prerogative, properly delegated*. Second, there would appear to be a quantitative imbalance between a governor's prerogative authority, and the governor's executive power. Given that the common law executive power was drawn narrowly, and the vast bulk of each governor's powers comprise of prerogative rights, preferences, capacities and immunities delegated to the governor in his commission, by and large the discretionary authority exercised by each governor comprised primarily in prerogative acts (other than purely executive acts).

Other than some support in the pre-Federation constitutional literature,[218] this assertion that there must be a species of executive power that is recognised by the common law must necessarily be so for two reasons. First, as will be seen later, the executive power of the Commonwealth is a variation of the executive power at common law – it is enlarged or modified, both expressly and by implication, by the words of the Constitution. The executive power of the Commonwealth is the common law executive power as modified by the Constitution.

The second reason is more basal. The constitutions of each of the States of Australia necessarily operate upon the assumption that the executive power of the State is vested in

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217 A Berriedale Keith, *Imperial Unity and the Dominions*, 52.

218 W Forsyth, *Cases and Opinions on Constitutional Law and the Various Points of English Jurisprudence, Collected and Digested from Official Documents and other sources*, 180.

the Queen or the governor of that State.[219] None of the constitutions of the States of Australia have a clause or provision similar to s 61 of the Australian Constitution which vests (or, on one construction, establishes) the executive power of that State. Surely each State has an executive power, or function, which gives rise to a power, implicitly found in the constitutional framework of that State? If this is so, that power, which supports the function of the State Government, and gives meaning to the phrase "the executive government of the State", must be impliedly found within the constitutional statutes of each State – most likely within the provisions affirming that there is to be a governor of each State, appointed by the Queen – or within each governor's commission issued by the Queen. The fact that each State has an executive power and the scope or ambit of that implied executive power must, by necessity, be sourced within the common law, is further evidence that there is, or would be a common law executive power. And just as the common law executive power is modified by the provisions of the constitutions and statutes of the States, the common law executive power in respect of the Commonwealth is modified by the express and implied modifications of the Constitution.

X Express Prerogative Rights and the Need for Recognition

The Australian Constitution is founded upon a written text. This was necessary so as to give effect to the establishment of a Federation that distributes legislative, executive and judicial powers between the central government (being the Commonwealth) and the original States (being the former colonies) and any new States established after Federation. Whilst the written text was modelled on the text and structure of the *Constitution of the United States*,[220] any reader of the Australian Constitution who is familiar with the British constitution will be immediately struck by the replication in express provisions of powers or functions which, in traditional British constitutional practice, are prerogatives of the

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219 A Twomey, *The Constitution of New South Wales*, 584; G Taylor, *The Constitution of Victoria*, 101; G Carney, *The Constitutional Systems of the Australian States and Territories*, 256, see also 262 and 305.

220 See *R v Kirby & Ors; ex parte Boilermarkers' Society of Australia* (1956) 94 CLR 254, 274-279 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

Crown which were recognised by the common law of the United Kingdom of Great Britain and (at the time of Federation) Ireland.

The Constitution expressly provides for the replication of a number of rights that were traditionally rights of the Crown which date to either before the time of the commencement of the common law (that is, the accession of Richard I),[221] or have been recognised by the common law since that time – and were generally accepted as prerogative rights of the Crown within the Westminster system of responsible government as that system of government had evolved to at the end of the reign of Queen Victoria. Those rights now have a statutory basis in the Commonwealth context, and are vested in different constitutional actors. As is pointed out in Chapter 5, the Constitution's text differentiates the senses in which the Queen, the Governor-General (acting pursuant to text of the Constitution), and the Governor-General (acting pursuant to a delegated authority on behalf of the Queen) have their powers and functions vested in them.

The constitutional powers and functions given to the Governor-General and replicated in the constitutional text are: to power to legislate[222] (with the concurrence of the Senate and the House of Representatives), pursuant to s 1; the power to "appoint such times for holding the session of the Parliament …" as well as summonsing and proroguing the Parliament,[223] and dismissal of the Senate and the House of Representatives, pursuant to ss 5 and 57; the power to issue writs for a general election of the members of the House of Representatives,[224] pursuant to s 33; the granting of Royal assent to proposed laws;[225] the command of the naval and military forces,[226] pursuant to s 68; and the power to appoint

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221 M Hale, *The History of the Common Law,* 1. King Richard I began his reign on 6th of July 1189 AD.

222 J Chitty, *Prerogatives of the Crown,* 408.

223 J Chitty, *Prerogatives of the Crown,* 68-72, the Sovereign has the right to summon, prorogue and dismiss the House of Commons.

224 Similarly, the Sovereign may issue writs for the calling of an election for the House of Commons, J Chitty, *Prerogatives of the Crown,* 69-70.

225 J Chitty, *Prerogatives of the Crown,* 74-75.

226 J Chitty, *Prerogatives of the Crown,* 44.

(and dismissal with the concurrence of Parliament) the judges[227] of the High Court and the other courts created by the Parliament, pursuant to s 72. These express powers and functions are reposed in the Governor-General. Furthermore, pursuant to s 74, there is an express affirmation that, subject to that section, the Queen retains "Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council". This is a replication of the traditional prerogative right of the Queen (to have Her Privy Council hear and determine appeals from Her dominions).[228]

Additionally, as this Chapter argues, the executive power of the Crown, being the Crown's power to execute and administer the law of the realm, is a traditional prerogative right of the Crown. It is argued in this dissertation that the framers sought to include this traditional species of the prerogative in s 61 of the Constitution. As a consequence of this, and also as a consequence of the Constitution expressly replicating (and modifying for Australian purposes) some of the traditional rights of the Crown in the text of the Constitution, as set out above, it is necessary to ascertain whether the Australian Constitution *also* provides for the continuation of the royal prerogative (being those rights, preferences, capacities and immunities not expressly replicated or averred to) in respect of the Commonwealth as a polity. Arguably, by expressly providing for *some, but not all* the rights, preferences, capacities and immunities of the Crown in the written text of the Constitution, the maxim *expressio unius est exclusio alterius* has relevance and application. Ordinarily, as a matter of statutory construction, the express inclusion of some rights leads to the conclusion that others are not included. This necessitated recognition or affirmation of the prerogative more generally in the text of the Constitution.

This dissertation argues that the prerogative operates against the constitutional text in the same way that it operates in respect of s 1A of the *Royal Commissions Act 1902* (Cth), and s 8A of the *Copyright Act 1968* (Cth). That is, those statutes did not expressly establish the prerogative, rather, they are drafted and enacted on the assumption that the prerogative

227 J Chitty, *Prerogatives of the Crown*, 75-78.

228 J Chitty, *Prerogatives of the Crown*, 410-411.

exists in the background and continues to operate. Those statutes operate on the assumption that they were not enacted in a vacuum; and that the silent operation of the prerogative is an underlying assumption to the efficacy of those statutes. The author contends that the same is true of the Constitution, and that express mention of *some* prerogative rights (including the prerogative power to execute and maintain the laws of the Commonwealth in s 61), does not limit the underlying operation of the prerogative because the continued operation of the prerogative is recognised and affirmed by the Constitution, and through the drafting choices of the framers, it is devolved and invested in the Crown in right of the Commonwealth.

CHAPTER THREE

THE PRE-FEDERATION CASE LAW

I INTRODUCTION

In his Sir Maurice Byers Lecture in 2007,[1] Justice Heydon drew attention to the words of an original member of the High Court, Justice Richard O'Connor, who said in *Tasmania v Commonwealth*:[2]

> I do not think it can be too strongly stated that our duty in interpreting a Statute is to declare and administer the law according to the intention expressed in the Statute itself. … The intention of the enactment is to be gathered from its words. If the words are plain, effect must be given to them; if they are doubtful, the intention of the legislature is to be gathered from the other provisions of the Statute aided by a consideration of surrounding circumstances. In all cases in order to discover the intention you may have recourse to contemporaneous circumstances—to the history of the law … In considering the history of the law … you must have regard to the historical facts surrounding the bringing the law into existence … You may deduce the intention of the legislature from a consideration of the instrument itself in the light of these facts and

1 J D Heydon, "Theories of constitutional interpretation: A taxonomy", N Perram & R Pepper (eds), *The Byers Lectures, 2000-2012*, 132, 136.

2 (1904) 1 CLR 329, 358-359; Justice Heydon points out that: "In this respect the Constitution differs in no way from any Statute of the Commonwealth or of a State".

> circumstances, but you cannot go beyond it.

Referring to the "liberal aspects", or permitted aspects, of O'Connor J's passage *supra*, Justice Heydon said in his Lecture: "Among the relevant historical facts are the technical meaning of the language as used in a legal context, the subject matter of the legislation, what the law was at the time the statute was enacted, and what particular deficiencies existed in the law before the statute was enacted".[3] Justice Heydon sourced these principles to the late Elizabethan era.[4]

In Chapter 5, the thesis articulates a core argument which sets out how the Constitution jurisprudentially rests upon the common law. The Constitution Act, the Constitution, and the common law all recognise and affirm the common law of the Crown as being part of the constitutional law of Australia. This is done to demonstrate how the rights, preferences, capacities and immunities of the Crown which are recognised by the common law are also recognised by the Constitution Act, and are therefore executed and maintained by the Crown in exercise of the executive power of the Commonwealth.

Before setting out that core argument, it is necessary to set out what "the historical facts surrounding the bringing [of] the [Constitution Act] into existence" were, and "what the law was at the time the [Constitution Act] was enacted". To do so has interpretative power in two ways. It has interpretive power on its own, and consistent with the reasoning of O'Connor J in *Tasmania v Commonwealth* (recited *supra*); *a fortiori,* it has interpretative power when the case law is set out, and it is seen how the framers understood the effect of that case law, and then crafted the constitutional text around the generally understood state of the case law. This second form of interpretative power has an intensity that commands recognition. It is supported by reading Chapters 4 and 6 consecutively to see (in the words of Justice Heydon) "what the law was at the time the [Constitution Act] was enacted", and

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3 J D Heydon, "Theories of constitutional interpretation: A taxonomy", N Perram & R Pepper (eds), *The Byers Lectures, 2000-2012,* 137.

4 Ibid 137, fn 21, citing *Heydon's Case* (1584) 3 Co Rep 7a at 7b; 76 ER 637 at 638 (Coke LCJ).

to see "what particular deficiencies existed in the law before the [Constitution Act] was enacted"; which then allows one to see what "the technical meaning of the [constitutional] language as used in a legal context" is.

It is therefore necessary to consider the English, British and colonial case law touching on the nature of the prerogative and the executive power. This is done in order to ascertain the state of the decisional law available in the law reports prior to the Federation Conventions, and which was available to the leading lawyers present at the 1891 and 1897-98 Conventions during which the Federation Bill was drafted. This examination of the decisional law is split into four parts.

The first part analyses the leading cases from the late Elizabethan period (when the English State began to take a shape recognisable today) up until the Glorious Revolution (at which time the most basic principles concerning the divide between royal authority and parliamentary authority were settled in favour of the Whigs, then dominant at Westminster). These cases are broadly described as the early English case law.

The second part addresses the case law of the nineteenth century. This comprises, on the one hand, decisions of the Judicial Committee of the Privy Council, emanating from such places as Jamaica, and touching upon the constitutional jurisprudence of the British Empire; and on the other, a series of cases from the Australian colonies (occasioned by immigration disputes), which the colonial statesmen were aware of, and which culminated (in the third part) in the decision of the Supreme Court of Victoria in *Toy v Musgrove*.[5] The fourth part briefly considers the appeal to the Judicial Committee of the Privy Council of the *Toy v Musgrove* decision.[6]

II THE EARLY ENGLISH CASE LAW

Having set out in the previous chapter that the prerogative is that body of doctrine recognised by the common law, and touching upon the quality of the princely title, it is

5 (1888) 14 VLR 349.

6 [1891] AC 272.

now necessary to turn to the late Elizabethan and early Jacobean period of history. As has been noted earlier, "no case on the prerogative came before the House of Lords after the seventeenth century Revolution Settlement until the immediate aftermath of the First World War".[7] This is peculiar, particularly as there was an intensity of cases that considered the scope or operation of the prerogative (or at least a description of its quality) in that crucible of the English State – the closing years of the reign of Elizabeth I and the early years after the accession of James Stuart in 1603. Much of this intensity is focused upon the career of one man, Sir Edward Coke. Barrister, Solicitor-General, Speaker of the Commons, Attorney-General, judge, chief justice (first of Common Pleas, then of King's Bench) and parliamentarian, Coke LCJ and his *Reports* were, and are, central to early prerogative jurisprudence. If Coke LCJ wasn't the author of the leading statements of principle, he was the recorder of them in his *Reports*. It has been said that Sir Edward Coke "worked since his early career to protect and even amplify royal power and the prerogative".[8] Dr David Chan Smith went on to say:[9]

> Coke's understanding of the relationship between the common law and the prince relied on a historical sociology drawn from his reading of Fortescue, but mostly indebted to *Bracton*. The relationship between subject and sovereign began primordially outside society in the law of nature, 'that which God at the time of creation … infused into [man's] heart, for his preservation and direction'.

Dr Smith pointed out that because human society required government, Bracton had explained that "[t]o this end is a king made and chosen, that he do justice to all men that

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7 B Hadfield, "Constitutional Law", L Blom-Cooper, et al, *The Judicial House of Lords, 1876-2009*, 504.

8 D C Smith, *Sir Edward Coke and the Reformation of the Laws, Religion, Politics and Jurisprudence, 1578-1616*, 2014, 251.

9 Ibid 252.

the Lord may dwell in him".[10] In quoting Sir Thomas Fleming (the then Chief Baron of the Exchequer) and again following Bracton, Dr Smith said: "God had given him [the king] power, the act of government, and the power to govern".[11] Fleming CB said the king's prerogative "is both ordinary and absolute … absolute power existing for the nation's safety, [and] varies with the royal wisdom". Coke LCJ described the king as "the head of the commonwealth … the fountain of all honour and dignity".[12] And Coke LCJ affirmed the earlier words of Sir Walter Moyle who said that "the king is held (as a matter) of right to administer law to each of his subjects".[13]

Dr Smith argued that "responsibility implied an important consequence for the king that was repeated throughout Bracton", the king "must surpass in power all those subjected to him". In *Calvin's case*, Coke LCJ spoke of the "mutual bond and obligation between the King and his subjects" which the relationship of allegiance required.[14] In the *Case of Monopolies*, Coke LCJ said that:[15]

> The duty of the queen towards the subject consists in protection … the duty of the subject to the sovereign is loyalty and obedience. The protection of the queen of her subjects is to guard them in peace and plenty. The first is to be performed by the execution of justice which is the principal means to preserve the peace.

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10 Ibid.

11 *Case of Impositions* (or *Bate's Case*) (1606), Lane 27, 145 ER 271.

12 *The Prince's Case* (1606) 8 Co *Rep* 18b, 77 ER 481, [1606] EWHC Ch J6; see also *Hugh Manney's Case*, 12 Co Rep. 101, 77 ER 1377; *Nevil's Case* (1604), 7 Co *Rep*. 33b, 77 ER 461.

13 Year Book, Hilary Term, 39 Henry VI, pl. 3, ff. 38b-40b per Sir Walter Moyle, a justice of the Common Pleas; approvingly quoted by Sir Edward Coke, see D C Smith, *Sir Edward Coke and the Reformation of the Laws*, 260.

14 *Calvin's Case* (1608), 7 Co Rep. 13a, 77 ER 392, 388, 392-393.

15 *Case of Monopolies* (or simply as *Darcy v Allein*) (1599) 74 ER 1131; (1602) 77 Eng Rep 1260 and (1599) Noy 173.

"The emphasis", Dr Smith noted, "on protection and preservation explained the purpose of God's abundant delegation or power to the queen and was the kernel of the bond between her and her subjects".[16]

Sir Edward Coke's much-celebrated decisions in *Prohibitions del Roy* in 1607 and the *Case of Proclamations* in 1611 illustrate the contested breadth of the prerogative at that point in history. As to the proposition that the prerogative permitted the king to resolve judicial disputes himself (and thereby exercise a judicial prerogative), Lord Coke's frequently quoted words in *Prohibitions del Roy* were:[17]

> His Majesty was not learned in the laws of his realm, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it.

In the *Case of Proclamations*, Lord Coke said that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm" and "the King cannot create any offence by his prohibition or proclamation which was not an offence before for that was to change the law, and to make an offence which was not".[18] Coke LCJ articulated in the *Case of Proclamations* a principle that Sir Stephen Sedley described as "having become and still is the foundational principle of a constitutional monarchy".[19] Lord Coke said: "The King hath no prerogative but what the law of the land allows him".[20]

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16 D C Smith, *Sir Edward Coke and the Reformation of the Laws*, 254.

17 *Prohibitions del Roy* (1607) 12 Co Rep 64; 77 ER 1342, 1343.

18 *Case of Proclamations* (1611) 12 Co *Reps* 74; 77 ER 1352, 1353.

19 S Sedley, *Lions Under the Throne, Essays on the History of English Public Law*, 128.

20 (1611) 12 Co *Rep* 74, 77 ER 1352.

Adam Tomkins said that Coke LCJ's decisions in *Prohibitions del Roy* are "generally regarded to have laid down fundamental restrictions on the prerogatives of the king as they affect judicial power".[21] And Tomkins observed (quoting Professor Paul Craig) that "what *Prohibitions del Roy* achieved for the divide between executive and judicial power, the *Case of Proclamations* did for the crucial division between executive and legislative competence".[22]

If *Prohibitions del Roy* and the *Case of Proclamations* were celebrated for forging a partial divide between the exercise of legislative, executive and judicial functions, then the upheaval of the Stuart Restoration saw the high point of the judicial recognition of the supremacy and absolute nature of the king's prerogative in the case of *Godden v Hales,*[23] which concerned the "legality of the use of the dispensing power"[24] of the sovereign. In an act of "rampant royalism"[25], the then Lord Chief Justice of the Common Pleas, Sir Edward Herbert, gave judgment for the defendant (and, in effect for James II), by concluding that:[26]

> … the Kings of England were absolute Sovereigns; that the laws were the King's laws; that the King had a power to dispense with any of the laws of Government as he saw necessity for it; that he was sole judge of that necessity; that an Act of Parliament could take away that power; that this was such a law; that the case of sheriffs in the second year of Henry the Seventh, was law, and always taken as law; and that it was a much stronger case than this.

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21 A Tomkins, *Our Republican Constitution*, 70.

22 Ibid; see P Craig, "Prerogative, Precedent and Power" in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord*, 67.

23 (1686) 11 St Tr 1165; 2 Show KB 475; 89 ER 1050.

24 Said to be the ancient authority to dispense with compliance by a person with a statutory requirement; in this case, to relive the requirement that papists are obliged to swear the oath of supremacy required by 25 Car II c. 2, within three months of receipt of their commissions of office.

25 A Tomkins, *Our Republican Constitution*, 100.

26 (1686) 89 ER 1050, 1051.

Other historical materials available record a sharper resolution of the principles in the king's favour. In the *State Trials* reports, Sir Edward Herbert's reasons were said to be:[27]

> 1. That the kings of England are sovereign princes. 2. That the laws of England are the king's laws. 3. That therefore 'tis an inseparable prerogative in the kings of England to dispense with penal laws in particular cases and upon particular necessary reasons. 4. That of those reasons and those necessities the king himself is sole judge ... 5. That this is not a trust invested in or granted to the king by the people, but the ancient remains of the sovereign power and prerogative of the kings of England, which never yet was taken away from them, nor can be.

The foregoing discussion of the early English case law serves to make four points. First, the prerogative was well on the way to taking shape as a quality of the princely title prior to the English Civil War, and, is perhaps, one of the causes of the English Civil War. Second, the prerogative was accepted as resembling (over five hundred years ago, and well before the emergence of the Montesquieuian trinity) a diverse set of qualities or attributes of the Sovereign, which went beyond what would today be described as executive functions. Third, having regard to the "relevant historical facts" and "the technical meaning of the language" as Justice Dyson Heydon described those interpretative aides *supra*, English constitutional jurisprudence (and more particularly, the constitutions of the British colonies) inherited the prerogative's jurisprudential canon which was forged during the life of Shakespeare. And fourth, when, in Chapter 5 this author comes to describe "the law of the Crown" as textually affirmed by the language of the preamble, and ss 2, 64 and 74 of

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27 (1686) 11 St Tr 1165.

the Constitution Act, the trail of that common law of the prerogative can be traced back to the time of Elizabeth I.

More generally, and permeating our modern understanding of the executive power of the Crown, historian Robert Tombs has written of the period of English history encapsulated by the life of Lord Coke, that:[28]

> From this time originates our instinctive belief that law is, or should be, more than a collection of executive orders and directives, and that 'law' and 'rights' embody intangible and permanent values. 'The rule of law' became central to English ideas of freedom and civilisation.

III THE NINETEENTH-CENTURY CASE LAW

This part of this chapter explores the case law concerning the powers of the Crown in a British colony, and how, if at all, the prerogatives of the Crown are devolved or invested in the sovereign's representative in the colony. The House of Lords' and Judicial Committee of the Privy Council's decisions, commencing from roughly the start of self-government in New South Wales, up until Federation, and some early Federation Privy Council decisions are relevant. The relevance of these decisions is two-fold. First, the framers of the Australian Federation, and the draftsmen who participated in drafting the early drafts of the Australian Constitution, as well as participating in the two Conventions of 1891, 1897-98, were aware of some, if not all, of the pre-Convention cases. Second, in construing the effect of the text of the Australian Constitution, the point has been made by Sir John Latham that the Australian Constitution (unlike the *United States Constitution*) was not enacted in a vacuum.[29] This distinction between the American Constitution and the

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28 R Tombs, *The English and Their History*, 206.

29 See also *In re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 521 (Latham CJ).

Australian Constitution, Sir Owen Dixon opined, was "fundamental".[30] The then Chief Justice said that "[i]n Australia we begin with the common law".[31]

The truth of this observation has, at least to those judges of the High Court of Australia who rely upon history as a guiding modality of constitutional interpretation, a fundamental effect. Sir Owen Dixon further observed in the same speech that:[32]

> … the common law was in fact an antecedent system of jurisprudence and has been instinctively so regarded. If it had been otherwise, probably the High Court would not have been established as a court of appeal for Australia. We act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute; but it remains true, I think, that as a distinction between American and Australian federalism the fact has received insufficient attention. Federalism means a rigid Constitution and a rigid Constitution means a written instrument. It is easy to treat the written instrument as the paramount consideration, unmindful of the part played by the general law, notwithstanding that it is the source of the legal conceptions that govern us in determining the effect of the written instrument.

This was not a one-off observation of Sir Owen Dixon. He made the same point when considering the prerogatives of the Crown and the construction and operation of s 61 of the Constitution in *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in Liq)*.[33] There his Honour said:[34]

> … the executive power of the Commonwealth is vested in the Crown, which, of

30 O Dixon, "The Common Law as an Ultimate Constitutional Foundation", *Jesting Pilate,* 203.
31 Ibid.
32 Ibid 205.
33 (1940) 63 CLR 278.
34 (1940) 63 CLR 278, 304.

> course, is as much the central element in the Constitution of the Commonwealth as in a unitary constitution. The United-States Government did not succeed to the sovereignty of the British Crown and therefore inherited none of its common-law powers or privileges. The reasons why the United-States Government has none but a statutory preference have no application to our Constitution: Cf., per *Story J., United States v. State Bank of North Carolina*. The Commonwealth Constitution, an enactment of the Imperial Parliament, took effect in a common-law system, and the nature and incidents of the authority of the Crown in right of the Commonwealth are in many respects defined by the common law. The prerogative which gives Crown debts priority over those due to a subject is in this way carried into the executive authority of the Commonwealth.

The High Court has regularly turned to British constitutional law and history to assist with construing the operation of the Constitution, and particularly ss 61 and 64 of the Constitution. Writing extra-curially, Justice Gummow noted that "[p]erhaps the most significant field where the High Court attends to matters of history is that of constitutional law"; continuing "I should have thought the text of the Constitution invites, perhaps requires, such activity".[35] Quoting the three foundation members of the Court, Justice Gummow has said:[36]

> It is true that what has been called an "astral intelligence," unprejudiced by any historical knowledge, and interpreting a Constitution merely by the aid of a dictionary, might arrive at a very different conclusion as to its meaning from that

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35 W M C Gummow, "Law and the Use of History", in J T Gleeson and R C A Higgins' *Constituting Law, Legal Argument and Social Values*, 72.

36 Ibid; quoting from *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 at 1106; c f Justice Gummow's subsequent statement at 72: "Too much should not be made of the history of the common law as determinative of the construction of the Constitution".

which a person familiar with history would reach.

Those general observations having been made, the High Court routinely turns to British and colonial constitutional history (including drafting history) to assist in construing the operation of Chapter II of the Constitution.

In respect of s 61 of the Constitution, matters of English and colonial constitutional practice and drafting history have been considered by the justices of the High Court in construing that provision. In *Pape*, French CJ comprehensively considered the drafting history of s 61.[37] Gummow, Crennan and Bell JJ expressly made use of "matters of Imperial and colonial history" when considering the operation of s 61,[38] and examined "the executive power exercised in the United Kingdom up to the time of the adoption of the Constitution".[39] Hayne and Kiefel JJ similarly considered the drafting history relevant, and affirmed the rule in *Cole v Whitfield*".[40] In *Williams [No 1]*, French CJ said that "the text, context and purpose of s 61 informed by its drafting history" is relevant to that section's construction,[41] and that recourse may be had to the "drafting history and the concept of executive government which informed" the drafting of s 61.[42] The Chief Justice then dedicated five pages of the *Commonwealth Law Reports* to considering the drafting history of s 61.[43] More generally, Hayne J spoke of "the carefully crafted checks (worked out in England over so many years and reflected in Australia in the Constitution, especially Ch IV) that effect parliamentary control …".[44] And Crennan J considered "the institution of responsible government and the exercise of executive power under the Westminster

37 (2010) 238 CLR 1, 56-60 [114]-[127].
38 (2010) 238 CLR 1, 75-79 [188]-[200].
39 (2010) 238 CLR 1, 89 [233].
40 (2010) 238 CLR 1, 106 [298]; *Cole v Whitfield* (1988) 165 CLR 360, 385.
41 (2012) 248 CLR 156, 179 [4].
42 (2012) 248 CLR 156, 193-194 [39].
43 (2012) 248 CLR 156, 194-199.
44 (2012) 248 CLR 156, 258 [216].

system of Britain" relevant in considering the operation of Chapter II, and s 61 more specifically.[45]

A note of caution ought to be made here. Whilst the history of the prerogative in British and colonial constitutional practice, as well as the Debates of the Federation Convention are a relevant interpretive tool in ascertaining the meaning and operation of s 61 of the Constitution – that presupposes (at least in respect of the Debates) that meaning can be gleaned from their content. In this respect, the learned Chief Justice concluded that "[t]here is little evidence to support the view that the delegates to the National Australasian Conventions of 1891 and 1897-1898, or even the leading lawyers at those Conventions, shared a clear common view of the working of executive power in a federation".[46]

In respect of s 64 of the Constitution, in the context of considering the power of the Governor-General to appoint more than one minister of state to administer individual departments of state of the Commonwealth, as the constitutional text provides for in s 64, McHugh J said:[47]

> The Constitution is contained in a statute of the United Kingdom Parliament, and its meaning must be determined by the ordinary techniques of statutory interpretation. It must therefore be interpreted according to the ordinary and natural meanings of its text, read in the light of its history, with such necessary implications as derive from its structure.
>
> In *Re Wakim*, I pointed out that the starting point for a principled interpretation of the Constitution is the search for the intention of its makers, which can only be deduced from the words that they used in the historical context in which they used them.

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45 (2012) 248 CLR 156, 349 [508], and 350 [510-512].

46 (2012) 248 CLR 156, 202 [54].

47 *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, 426 [106] and [107] (footnotes omitted).

The recognition that Imperial and colonial history, coupled with the framers' intentions as gleaned from the Convention Debates in 1891 and 1897-98 are relevant, and of assistance in construing the operation of Chapter II of the Constitution, and ss 61 and 64 more specifically, means that it is relevant to consider the English, British and colonial case law that predates the drafting of the constitutional text. In particular, the nature of gubernatorial office in the British Empire, and the powers and functions that are vested in a governor, or delegated to a governor from the Sovereign, and an examination of the process by which a colonial governor becomes seized of the authority to exercise the prerogatives of the Crown.

Cameron v Kyte

The first decision is that of *Cameron v Kyte,*[48] heard by the Judicial Committee of the Privy Council in 1835. The case was an appeal from the Supreme Court of the British Colony of Berbice. The circumstances of the case were that George Hallam was appointed by the late King George III as vendue master in the Colony of Berbice. The vendue master is entitled to a commission of five percent on the amount of the purchase money on the sale of goods. In 1810 the Lieutenant Governor of the Colony, Robert Gordon, is said to have reduced the commission payable to a vendue master from five percent to one and half percent on the gross amount of biddings. In 1824, Charles Kyte obtained an appointment as deputy vendue master, and for some time received commission upon execution sales at the five percent rate, until 1829. The appellant, Donald Cameron, purchased a cane field in 1829, and opposed the deputy vendue master's claim for the higher rate than one and a half percent – alleging that the exaction of such rate was illegal pursuant to Lieutenant Governor Gordon's notification in 1810. Amongst other things, the questions for the Supreme Court and the Privy Council involved a consideration of the powers of a colonial

48 (1835) 3 Knapp 332; [1835] 12 ER 678.

governor. The reasons for decision were given by Baron Parke. The five percent fee was declared to be a lawfully set fee, "unless it has been reduced by competent authority".

Parke B affirmed the concessions made before the Board that "the King might" by "virtue of his Sovereign authority, alter the legal amount of the fees or compensation, though such act would be of a legislative nature".[49] Approving the principle laid down by Lord Mansfield CJ in *Hall v Campbell*,[50] Parke B said, "The King having the whole legislative authority in a conquered colony, insofar as he may not have parted with it by capitulation, or by his own voluntary grant".[51] "But it was contended", said Lord Wensleydale, "that the Governor in that character had not any such power; that none such was delegated to him by the King expressly or by implication".[52] The decision is an important marker in British constitutional law as it stands for the proposition that the sovereign's regal power (or prerogative) is not vested in a colonial governor (however so described) unless expressly or implicitly so vested. Lord Wensleydale opined on behalf of the Board that:[53]

> … no authority or dictum has been cited before us to show that a Governor can be considered as having delegation of the whole Royal power, in any colony, as between him and the subject, when it is not expressly given by his commission.

His Lordship said:[54]

> We are therefore of opinion that the Governor does not in the sense above mentioned represent the Sovereign, and has not the character of a delegate of all

49 [1835] 12 ER 678, 682.
50 (1774) 1 Cowp 204; [1774] 98 ER 1045.
51 [1835] 12 ER 678, 682.
52 [1835] 12 ER 678, 682.
53 [1835] 12 ER 678, 683.
54 [1835] 12 ER 678, 683.

> the Royal power. If, therefore, the Governor be an officer only with limited powers, which do not expressly include the Act in question, is such an Act authorised by implication? Implied powers may be given to an office as incident, either because they are necessary to its due execution, or because they are such as have been usually exercised by those who have borne it.

The passage just recited was approvingly summarised as good law by the learned author of a leading pre-Federation text on constitutional jurisprudence in the British colonies.[55]

Hill v Bigge

The second decision is that of *Hill v Bigge*,[56] heard by the Judicial Committee of the Privy Council in 1841. The case was an appeal from the Court of First Instance of Civil Jurisdiction of the Island of Trinidad. The circumstances of the case were that the appellant, Sir George Hill, became bound in 1825 by his writing to the respondent, Thomas Bigge, and his partners, who were jewellers in the city of London for the sum of £825 13s. Sometime after the "giving the said bond", Hill was appointed as Lieutenant Governor of the Island of Trinidad and its dependencies. In 1837, Thomas Bigge and his surviving partners brought an action in the Court of First Instance for the recovery of the debt. In 1877, the Lieutenant Governor came into Court under protest and pleaded that the Court could not give judgment against him "because, at the time of the commencement of the said action, he was, and still continued, Lieutenant Governor of the Island of Trinidad, and its dependencies, and that he was therefore not liable to be sued in the said Court".[57]

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55 W Forsyth, *Cases and Opinions on Constitutional Law and the various points of English Jurisprudence, Collected and Digested from Official Documents and other Sources*, 80; "The Governor of a colony has not a delegation of the whole royal power, as between him and a subject, which is not expressly given by his commission; nor does any commission to Colonial Governors convey such an extensive authority. They have merely a limited authority from the Crown, and their assumption of an act of sovereign power out of the limits of the authority so given to them is purely void".

56 (1841) 3 Moore 465; [1841] 13 ER 189.

57 [1841] 13 ER 189, 190.

Before the Board, counsel for the appellant, Mr Burge QC, submitted that: "By the terms of his commission, he is vested with the legislative as well as the executive power", and "his exemption cannot therefore, be merely personal, as from arrest, but is much higher; he is not within the jurisdiction of the Courts; they are incompetent to entertain a suit, or to pronounce judgement therein against him". Mr Burge continued: "By that, all the powers of the executive government within the Island are vested solely in the Governor for the time being".[58] These submissions were rejected by the Board. Lord Brougham said:[59]

> If it be said that the Governor of a Colony is *quasi* Sovereign, the answer is, that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him…

"The Governor", said Lord Brougham (and quoting De Grey LCJ in *Fabrigas v Mostyn,*[60] when that case was before the Common Pleas), "is the King's servant: his commission is from him, and he is to execute the powers he is invested with under that commission; which is to execute the laws of Minorca, under such instructions as the King shall make in Council".[61]

His Lordship affirmed the holding in *Cameron v Kyte*, and rejected "a claim to represent the Sovereign and hold the royal power by delegation" had been established.[62]

Again, Lord Brougham's holding was approvingly quoted by William Forsyth QC in *Forsyth's Cases and Opinions on Constitutional Law.*[63]

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58 [1841] 13 ER 189, 190.

59 [1841] 13 ER 189, 193.

60 1 Cowp 161.

61 [1841] 13 ER 189, 193.

62 [1841] 13 ER 189, 193.

63 W Forsyth, *Cases and Opinions on Constitutional Law and the Various Points of English Jurisprudence, Collected and Digested from Official Documents and other sources*, 80.

Musgrave v Pulido

The third decision that informed the delegates and representatives of the nature of the authority of a colonial governor was *Musgrave v Pulido*[64] – a decision of the Judicial Committee of the Privy Council, on appeal from the Supreme Court of Jamaica on the trial of an action for trespass for seizing and detaining a vessel.

The facts of the case were that the respondent, Jose Ignacio Pulido, claimed from the appellant, Sir Anthony Musgrove, a sum of £14,000 in damages for trespass for the unlawful detention by the appellant of the respondent's vessel, the *Florence*, and her cargo, in the Port of Kingston, Jamaica. The *Florence* was on a voyage from Colon to the Island of St Thomas, and was compelled to berth in the Port of Kingston for repairs. The appellant was at the time the Captain-General and Governor-in-Chief of the Island of Jamaica and its dependencies. The matter was heard by the Supreme Court of Jamaica, and the defendant appealed the Supreme Court's decision to the Privy Council. The issue for the appeal was whether the act of state doctrine protected the appellant's actions, and precluded the respondent from claiming for damages.

In considering the defendant's plea that the acts complained of were protected by the doctrine of acts of state, the Privy Council was required to consider what was the true nature of the lawful authority of a governor of a British colony. Sir Montague Smith, delivering the Board's reasons for judgment approved the following passage from the earlier decision of Baron Parke of Wensleydale in *Cameron v Kyte,*[65] where his Lordship said:[66]

> There being, therefore, no express authority from the Crown, the right to make such an order must, if it exist at all, be implied from the nature of the office of

64 (1879) 5 AC 102; consisting of Sir James W Colvile, Sir Barnes Peacock, Sir Montague E Smith, Sir Robert P Collier, and Sir Henry S Keating.

65 (1835) 3 Knapp, 332; 12 ER 678.

66 (1879) 5 AC 102, 109-110.

> Governor. If a Governor had, by virtue of that appointment, the whole sovereignty of the colony delegated to him as a Viceroy, and represented the King in the government of that colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject, living within his government, provided the act would be valid if done by the Sovereign himself, though such act might not be in conformity with the instructions which the Governor had received for the regulation of his own conduct. The breach of those instructions might well be contended on this supposition to be matter resting between the Sovereign and his deputy, rendering the latter liable to censure or punishment, but not affecting the validity of the act done.

Sir Montague Smith then approvingly quoted the words of Parke B, cited *supra*. Also approved by Sir Montague Smith were the following words of Lord Parke: "All that we decide is that the simple act of the Governor alone, unauthorised by his commission, and not proved to be expressly or impliedly authorised by any instructions, is not equivalent to such an act done by the Crown itself."[67] Sir Montague Smith concluded that:[68]

> It is apparent from these authorities that the Governor of a Colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that, for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him.

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67 (1879) 5 AC 102, 110.

68 (1879) 5 AC 102, 111.

Musgrave v Pulido did not go unnoticed in the Australian colonies. The future President of the First Convention in 1891, Sir Henry Parkes, was aware of the *Musgrave v Pulido* case. The *Sydney Morning Herald* reported that Sir Henry had undertaken a "lengthy constitutional analysis of the right and wrong doctrines which are prevalent on the position of the Governor".[69] The *Herald* editorialised that:[70]

> Most of the false reasoning and vicious conclusions which affect the treatment of colonial topics come from a wholesale and indiscriminate practice of jumbling all English dependencies into one mess, and then affirming propositions which, if true of any, are said to be true of all. The erroneousness of the style of reasoning is nowhere near conspicuous than in the matter of colonial Governorships.

The *Sydney Morning Herald* continued:[71]

> Nevertheless the judgment here referred to [*Musgrave v Pulido*] emphasises afresh some broad constitutional principles, which are of as universal a character as any that the subject admits of. The Governor of a dependency is not outside the law, but is within the law ... The popular error is for observers to be so far dazzled by the local elevation to which he is temporarily raised, as to believe that he occupied a position nearly analogous to that of his Sovereign.

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69 *Sydney Morning Herald*, 14 February 1880, 4, 5.
70 *Sydney Morning Herald*, 14 February 1880, 4, 5.
71 *Sydney Morning Herald*, 14 February 1880, 4, 5.

Interestingly, two years after the reasons for decision were published, on the other side of the continent a mysterious author penned the following letter to the editor of the *West Australian* newspaper:[72]

> THE CORRECT VIEW OF A GOVERNOR'S POSITION
> TO THE EDITOR OF THE WEST AUSTRALIAN
>
> Sir, - I noticed in last Saturday's *Herald* a paragraph concerning a certain 'well-known politician' who, it was alleged, had, in absenting himself from the late festivities in Geraldton, forgotten the respect due to "the representative of Her Majesty." Having on several occasions observed other remarks in the public press, from which I gathered that the writers had very exaggerated notions of the powers and prerogatives of a Governor, I beg you will kindly allow me to give the correct view of a Governor's position.
>
> In the case of *Hill v. Biggs* (3 Moore, P.C. 465), which was an action for a private debt brought against the Governor of Trinidad, the defendant pleaded, as a persona privilege, exemption from being sued in the courts of the colony. Lord Brougham delivered the judgement of the Judicial Committee, and the claim to such exemption was thus met: "If it to be said that the Governor of a colony is a quasi Sovereign, the answer is, that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which the commission clothes him." In his judgment, in *Musgrave v. Pulido* (5 App. Ca. 102), Sir Montague Smith, after quoting the above and other cases, said: "It is apparent from these authorities that the Governor of a colony in

72 *The West Australian*, 3 November 1882, 3.

> ordinary cases cannot be regarded as a viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him.
>
> Your obedient servant,
>
> Z
>
> Perth, 1st Nov.

Whilst *Musgrove v Pulido* considered the application of the doctrine of act of state; and did not expressly consider the operation of the prerogatives of the Crown in so far as they were vested in colonial governors; the decision does afford a very useful authority for the first principle that a colonial governor is not a viceroy, and his gubernatorial authority is derived from his commission, and limited to the powers expressly or impliedly entrusted to him. The decision was known in the colonies, and forms the starting point for considering the operation of constitutional principles as they pertain to the power and authority of a colonial governor.

Ex parte Lo Pak

Less than three years before the 1891 Convention in Sydney, the Full Court of the Supreme Court of New South Wales heard the case of *Ex parte Lo Pak*[73]. The facts of the case were that the applicant, a subject of the Emperor of China, was a passenger on board a steamship, the S.S. *Afghan*. He was for many years (and, importantly, on 6 December 1881 – the time of enactment of 45 Vic. No 11, the *Influx of Chinese Restriction Act*) a resident of the colony of New South Wales. Having proved to the satisfaction of the appropriate persons that he was a resident of the colony on that date, he obtained under section 9 of that Act a certificate of exemption, permitting his re-entry to the colony in the event of

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73 (1888) 9 NSWLR 221; constituted by Chief Justice Sir Frederick Darley, Justice (later Sir) William Windeyer and Justice Sir Joseph Innes.

leaving it. The applicant departed the colony, and travelled to China. He returned on board the *Afghan* with other subjects of the Emperor of China. Upon returning to the port of Sydney Harbour, colonial police boarded the ship and forcibly prevented the Chinese on board the *Afghan* from landing.

On 14 May 1888, an ex parte application was heard by the Chief Justice in chambers for a rule nisi for a writ of habeas corpus requiring the officer in charge of the colonial police and the Captain of the *Afghan* to show cause why the applicant should not be released and permitted to land. The Full Court heard the motion to make the rule nisi absolute.

As part of the oral argument of the case, counsel for the respondent, Julian Salomons QC (who, in 1866, controversially accepted and then turned down the Chief Justiceship of the Colony), argued that "the Queen's prerogatives are as great as in England, and are exercised by the Governor in Council, and the Governor possesses both the prerogative of pardon and prerogative of excluding aliens".[74] The Full Court of the Supreme Court was required to consider what prerogatives the Colonial governor was vested with. The Full Court consisted of Darley CJ, Windeyer and Foster JJ. As a first principle, Darley CJ stated:[75]

> I am distinctly of opinion that, even supposing the King or Queen of England have power by proclamation to prevent aliens from entering the kingdom, and a statute to be unnecessary, yet that power so vested is a power personal to the Sovereign, and cannot be delegated either to the Governor, or the Government of this colony. I am therefore of opinion that, if the Government have made a proclamation forbidding aliens of any nation to land – although it is not alleged that any such proclamation exists – it is illegal, and has not the effect of suspending the operation of the writ here asked for. Much has been said about the prerogative of the Crown to make proclamations, and it is said that

74 (1888) 9 NSWLR 221, 230 (Darley CJ).

75 (1888) 9 NSWLR 221, 238 (Darley CJ).

> proclamation when issued must be obeyed. That is only so if the proclamation be itself legal. Proclamations which enunciate the law of the country are binding, but no proclamation contrary to the law, the statutes, and the customs of the realm, is legal. That is distinctly laid down in Bacon's *Abridgment*, vol. vi., p.451, under the title "Prerogative" where the law upon the subject is perhaps better gathered together than in any other text-book. It is a text-book of the highest authority, and there it is stated that any proclamation of the king contrary to the laws, statutes, or customs of the realm is unlawful and of no force whatever.

In finding for the applicant, Darley CJ opined that the proper course would have been for the legislature to enact legislation so permitting the Colonial Government to preclude the landing of persons in the circumstances of the applicant. Furthermore, the Chief Justice was of the view that even if the British Sovereign had the power by proclamation to prevent aliens from entering the kingdom, and a statute was unnecessary, power so vested is a power personal to the Sovereign which cannot be delegated either to the Governor or the Government of the Colony.[76] If a prerogative to refuse entry to aliens was not a prerogative of the Crown in England, then the Chief Justice came to the conclusion that it is not a prerogative that can or had been delegated.

In concurring with the Chief Justice that the Governor of New South Wales did not have such a prerogative to expel an alien, Windeyer J said:[77]

> There cannot be the slightest doubt, however, that the Constitution of England, under which we all live, has always regarded with extreme jealousy the exercise of any power on the part of the Crown as expressed by Royal proclamation. The law on this subject is abundantly clear, and is thus laid down in *Chitty's*

76 (1888) 9 NSWLR 221, 237, 238.

77 (1888) 9 NSWLR 221, 242.

> *Prerogatives of the Crown*, p.104:- "And it is clear that by the Constitution of the country, this prerogative respecting proclamations merely enables the King as executive magistrate to command and enforce the performance by his subjects of existing laws, and to make or alter regulations over which His Majesty has a peculiar jurisdiction, and does not entitle him to break through those fundamental principles on which the legislative portion of the Government is founded, by commanding the observance of matters not sanctioned by Parliament."

His Honour continued:[78]

> Whatever may be the inherent prerogative of the Crown with regard to its power to exclude foreigners from its territory, the question here is, whether, in the absence of any Royal proclamation, the executive Government of this colony has the right to exercise such a power of exclusion as is claimed for it under the circumstances of this case … In deciding upon the facts before us, that the executive has no such power, we are in no way endangering the security of the country, or the welfare of its inhabitants, nor are we abridging its limited powers of self government.

Whilst concurring with Darley CJ in one respect – that the executive government of the Colony had no such prerogative to exclude aliens – Windeyer J differed from the Chief Justice in his reasoning in one key respect:[79]

> Argument has been addressed to us as if the executive Government of the colony were the executive Government of a Sovereign State, whereas it has no more

78 (1888) 9 NSWLR 221, 243.
79 (1888) 9 NSWLR 221, 244.

> powers than such as are given to it under our *Constitution Act*, and as are necessary for its administration.
>
> ... in the absence of any such legislation, it appears to me that the executive Government of the colony is not clothed with any such powers as the executive Government of the mother country may possess under Royal proclamation.
>
> … If it is necessary that such a power should be exercised by the Governor and executive Government of this colony, the possession of the power must first be conferred by Imperial authority.

The difference between the reasoning of Darley CJ and Windeyer J is this: the Chief Justice denied that the Sovereign had such a prerogative to delegate; Windeyer J said that even if there were such a prerogative, it needed to be properly delegated by the Imperial Parliament or the Sovereign, and had not been in this instance.

Foster J concurring also found for the applicant, and his reasoning was consistent with both aspects of Darley CJ's reasons, and Windeyer J's reasons. Foster J observed that he was "by no means satisfied that the executive of a colony possesses the powers of a sovereign state, for that seems to me inconsistent with the existence of the sovereign power elsewhere."[80] But his Honour also noted that: "It is admitted that a colonial executive has not all the powers of a Sovereign – for instance, a colony cannot declare war – and no sufficient reason has been put before us for supposing that it has this special power of excluding foreigners."[81] Foster J concluded that in any event, it was unnecessary to decide this point.[82]

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80 (1888) 9 NSWLR 221, 248–249.
81 (1888) 9 NSWLR 221, 248–249.
82 (1888) 9 NSWLR 221, 24–249.

The *Lo Pak case* also attracted significant media attention. *The Argus* reported under the headline "The Chinese Question, the Situation at Sydney", that the Full Court had dealt with the application to make absolute a show cause why the great writ should not issue. *The Argus* reported Mr Salomons QC as arguing that "the Executive in declining to allow the Chinese to land here, were exercising a prerogative with which the Supreme Court could not intervene".[83] Such was the public and political interest in the case, and the ramifications to "The Chinese Question", that the leader of the Free Traders in the New South Wales Legislative Assembly, William (later Sir William) McMillan gave notice of his intention to move a motion of censure in the government for the language used by the government in their cable to the Secretary of State "as well as their illegal procedure in dealing with Chinese immigrants".[84]

The *Lo Pak case* caught the attention of the *South Australian Register* which reported in detail the arrival of the *Afghan*, and the detention of Lo Pak, and the subsequent application for a writ of habeas corpus.[85] Again, reporting the legal proceedings under the heading "The Chinese Question", the *South Australian Register* also reported upon the Premier of South Australia, Thomas Playford, sending a telegram to the Premiers of Victoria, Queensland, Western Australia and New Zealand, proposing the calling of a "Chinese Conference" to respond to the perceived threat of an influx of Chinese immigrants.[86]

The *Lo Pak case* caught the attention of colonial newspapers to the North as well. Rockhampton's *Morning Bulletin* reported it in the intercolonial news of the day from Sydney. After reporting upon the apparently important issue of the departure from Sydney of the New South Wales "contingent of the Intercolonial Rabbit Commission", which had left for Melbourne, the *Morning Bulletin* reported that the formal proceedings associated

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83 *The Argus*, 18 May 1888, 8.

84 *The Argus*, 18 May 1888, 8.

85 *South Australian Register*, 18 May 1888, 5, 6.

86 *South Australian Register*, 18 May 1888, 5, 6.

with the "Chinese difficulty" had taken place on 15 May 1888.[87] The *Morning Bulletin* also reported that Mr Salomons submitted to the Court that "there was no exemption paper bearing the name of Lo Pak, though there was a paper in the name of Li Kong, which Lo Pak claimed as his, he having changed his name during his absence" from the Colony.[88] Another northern newspaper, *The Queenslander*, also reported on "the Chinese difficulty" in the New South Wales Supreme Court, and Parliament.[89]

Two days later, the *Sydney Morning Herald* reported that the Full Court had been engaged throughout the day before in dealing with the *Lo Pak* matter. *The Herald* reported that it was argued that the Sovereign of every state had the right to prevent the influx of foreigners,[90] but that the Chief Justice said that he was of the opinion:[91]

> … that the Governor of this colony possessed no such power. It might be said that the Sovereign of England had that power; but even supposing that the Queen had the power by proclamation to do this, this power was vested in the English Sovereign personally, and not transferred to the Governor or Government of this colony.

The *Sydney Morning Herald* in its 'Law Report' on 18 May 1888[92] reported the *in banco* hearing of *Ex parte Lo Pak* in full with a detailed summary of counsels' submissions and Darley CJ's reasons for judgment. Whilst it is unusual by today's newspaper standards, the *Herald*, in publishing the Chief Justice's reasons in full, reports that Darley CJ was of the opinion that any power to exclude an alien from landing was a personal power to the King or Queen and cannot be delegated. The *Sydney Morning Herald* reports the Chief Justice as

87 *Morning Bulletin*, 16 May 1888, 5.
88 *Morning Bulletin*, 16 May 1888, 5.
89 *The Queenslander*, 19 May 1880, 780-781.
90 *Sydney Morning Herald*, 18 May 1888, 8.
91 *Sydney Morning Herald*, 18 May 1888, 8.
92 "Law Report", *Sydney Morning Herald*, 18 May 1888, 9.

having exclaimed: "Now, with respect to proclamations. We have heard a great deal about the prerogative of the Crown, and the power of the Crown to make proclamations".[93]

The *Herald* promised to publish Mr Justice Windeyer's judgment *in extenso* in the following day's edition. And on Saturday, 19 May 1888, the *Herald* made good on its promise. By doing so the *Herald* drew to the attention of discerning readers that Windeyer J opined:[94]

> The argument has been addressed to us as if the Executive of the country were an executive sovereign State, whereas it has no more powers than are stated under our Constitution Act. If it is necessary that the Executive Government should be armed with powers of that kind they could be obtained by legislation in the mother country or by legislation in this country, approved by the mother country: but in the absence of such legislation it appears to me that the Executive Government here is not clothed in the powers, that the Executive Government at home possesses of issuing royal proclamations.

And on the same day, 19 May 1888, the *Queanbeyan Age* reported upon the *Lo Pak case.*[95] The *Lo Pak case* was reported on in detail by other colonial newspapers.[96]

The significant newspaper coverage of the *Lo Pak case* warrants attention. It evinces that this decision was well known amongst the informed members of the colonies. The *Lo Pak case* and the details of the case, including the issue of the Executive Government's prerogatives cannot be said to have gone unnoticed by the colonial Crown law officers as well as those framers who were lawyers. The newspaper coverage shows that there was

93 *Sydney Morning Herald*, 18 May 1888, 9.

94 *Sydney Morning Herald*, 19 May 1888, 10.

95 "The Chinese Question, Exclusive of the *Afghan's* Passengers Illegal, and Supreme Court Proceedings", *Queanbeyan Age*, 19 May 1888, 2.

96 "The Detention of the Afghan's Passengers", *The Maitland Mercury & Hunter River Geul Advertiser*, 17 May 1888; "The Chinese Question ... N.S.W. Government Defeated in the Supreme Court", *South Australia Register*, 18 May 1888, 5 and 6.

broader interest in the devolution and investment aspect of how the prerogative came to be exercisable by the colonial governors.

Ex parte Leong Kum

The fourth decision that constituted the background to the drafting of the clauses that were eventually enacted as sections 2, 61 and 64 of the Constitution was *Ex parte Leong Kum*.[97] That case may be considered the twin case to *Ex parte Lo Pak*. It was heard at the same time by the Full Court of the Supreme Court of New South Wales as *Lo Pak*, and by Darley CJ, Windeyer and Innes JJ – the first two justices also hearing the *Lo Pak* matter. Again, Julian Salomons QC appeared for the applicant.

The facts can be stated briefly. The applicant was a subject of the Emperor of China and had never resided in the Colony of New South Wales. The applicant arrived on the *s.s. Menmuir*, and was prohibited from landing by the Collector of Customs. Acting under the instructions of the Colonial Government, the Collector of Customs refused to allow the Applicant to pay the £10 sum, which was tendered as the poll-tax. The Collector of Customs refused to allow the Applicant to leave the ship, and the applicant brought an ex parte application for the Collector of Customs to show cause why a writ of *habeas corpus* should not be issued.

The reasons for judgment of each of the judges should be read in concert with their reasons in *Lo Pak*. Darley CJ, Windeyer and Innes JJ all find for the applicant. Darley CJ said:[98]

> .... but with regard to the question whether this colony has the power of a sovereign State, I desire to add a few words. I stated that in my opinion this colony had no such power, and after having paid every attention to the arguments put before us I am the more firmly convinced that the opinion which I

97 (1888) 9 NSWLR 250.

98 (1888) 9 NSWLR 250, 255.

then formed is correct.

Darley CJ concluded that the right the Government is said to have "cannot exist in a colony such as this, dependent as it is on a superior Government".[99] Windeyer J concurred:[100]

> As I stated in my judgment the other day in the case of *Lo Pak*, it appears to me that the fallacy of Mr. *Salomons'* argument lies in the assumption that the executive power of this country – which is usually termed the Government – has the same sovereign right with regard to the exclusion of aliens from the country, that is possessed by the executive power of a sovereign state. Mr. *Salomons*, throughout his argument, assumed that the executive of this country had that power, but he has advanced nothing to satisfy my mind that it has or was ever given any such power. His argument has proceeded on the assumption that the Crown has parted with its prerogative, or that it has delegated the exercise of that prerogative to the executive Government of this country; but although this has been broadly stated, no authority has been advanced which goes in any way to convince me that there has been either such a surrender of this prerogative by her Majesty or any delegation of the exercise of such prerogative to the Government of this country. There is nothing in the Act under which the legislative powers of responsible government were given to this country which in any way points to the conclusion that Her Majesty surrendered her prerogative in this regard either to the Legislature or to the Executive of this country...

Innes J also concurred with the Chief Justice and Windeyer J:[101]

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99 (1888) 9 NSWLR 250, 256.

100 (1888) 9 NSWLR 250, 261-262.

101 (1888) 9 NSWLR 250, 267 (Innes J).

> ... I am clearly of opinion that no such authority is vested in any person or body of persons in this colony, at all events other than the Parliament of the colony speaking by a statute.

Innes J continued:[102]

> My brother *Windeyer* has shewn clearly that it is altogether futile to contend that the powers of a sovereign State are possessed by a colonial executive.

Similar to the *Lo Pak case*, the *Leong Kum case* attracted newspaper attention.[103] The *Argus* set out in great detail the parties' submissions.[104] The *Sydney Morning Herald* published a comprehensive report of the Supreme Court's decision and the judges' reasons for judgment, along with counsels' submissions.[105]

Interestingly, there was a further decision of the Supreme Court which followed the *Leong Kum case*, and whose facts were nearly identical. On 5 June 1888, the Supreme Court of New South Wales made absolute a rule nisi for habeas corpus in *Ex parte Woo Tin*.[106]

IV *Toy v Musgrove*

The fifth key judicial decision which preceded the Constitutional Conventions of the 1800s, and was known to the framers of the 1891 draft Bill to federate the Colonies, was the 1888 decision of the Full Court of the Supreme Court of Victoria in *Chung Teong Toy v*

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102 (1888) 9 NSWLR 250, 269 (Innes J).

103 "The Honourable Profession of Advocacy", *Bathurst Free Press and Mining Journal*, 29 May 1888, 2.

104 "Chinese Question, Action Against The Collector of Customs", *The Argus*, 11 July 1888, 5.

105 "Law Report", *Sydney Morning Herald*, 24 May 1888, 4.

106 (1888) 9 NSW LR 493.

Musgrove,[107] and the subsequent appeal to the Privy Council. The appeal to the Privy Council was heard by the Board only a matter of three weeks before the commencement of the 1891 Convention in Sydney, and the Attorney-General of Victoria (at the time of the Full Court decision), Henry Wrixon QC, was counsel for the State of Victoria before the Board. By necessity of travelling time, Wrixon, who was a delegate for Victoria at the 1891 Convention in Sydney, was a late arrival in Sydney on account of his travel back from London from appearing before the Board for the Colony. As will become apparent in subsequent chapters, Henry Wrixon and Alfred Deakin placed significant emphasis upon the decision of the Full Court of the Supreme Court in advocating and eventually convincing the delegates to the 1891 Convention to make a textual reference to the devolution and investment of the prerogative rights, preferences, capacities and immunities of the Crown when Chapter II, "The Executive Government" is considered in the committee stage of considering the draft Bill to federate the Australian Colonies.

Toy v Musgrove was a significant decision of the Full Court of the Supreme Court of Victoria. Like *Ex parte Lo Pak* and *Ex parte Kum*, it was heard in 1888, and was heard before a Full Court consisting of six justices.[108] Counsel for the Plaintiff, Chung Teong Toy, was Dr John (later Sir John) Madden, who was to be appointed as Chief Justice of the Supreme Court less than five years later in 1893. Counsel for the defendant was Henry (later Sir Henry) Wrixon who was the serving Attorney-General in the Gilles-Deakin administration. It had been Wrixon who elevated then Justice Higinbotham to the office of Chief Justice two years before the case.

The facts of *Toy v Musgrove* are strikingly similar to the contemporaneous decision of *Ex parte Lo Pak*. Reading the facts from Higinbotham CJ's reasons for judgment, the plaintiff, Ah Toy was a subject of the Emperor of China, and was not a subject of Queen Victoria. The Plaintiff arrived on the British ship *Afghan* in the Port of Melbourne on 27

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107 (1888) 14 VLR 349.

108 The Full Court consisted of Higinbotham CJ, Kerferd, Williams, Holroyd, a'Beckett and Wrenfordsley JJ.

April 1888. The *Afghan* was the same ship involved in the *Ex parte Lo Pak* matter. Ah Toy was an immigrant within the meaning of the *Chinese Immigrants Statute 1865*, and *The Chinese Act 1881*, and was entitled upon the payment of a poll-tax to land in the Colony of Victoria. Central to the consideration of the case were two issues. First, to what extent is the defendant, the Collector of Customs protected from suit, and secondly, what, if any, prerogatives of the Crown of England might have been vested either in the governor of the Colony, as the representative of the Crown, or in the members of Her Majesty's Government for Victoria.

The case was brought to the attention of the Colony's Parliament. On 9 October 1888, Wrixon tabled a 164 page document which was a transcript of the four day hearing.[109] Whilst considerations of space do not allow for it to be included here, a detailed examination of the transcript of the hearing shows that the Court was focused very closely, for four days, upon the issue as to how the Colonial executive government, or the Colonial Governor, became vested with the authority to exercise the prerogatives of the Crown. Reading the transcript, one is struck by the command that the parties had of the issues in contention, and the depth and breadth of the sources of jurisprudence that the parties were drawing to the Court's attention. Blackstone, Chitty, Hearn, May Todd, Comyns, Hallam, Broom, Dicey, Wheaton, Stephen, Bacon and all the cases mentioned *supra*; the parties' references to these authorities are repetitiously cited throughout the transcript of the hearing. Dr John Madden summarised the plaintiff's position as:[110]

> … it is not competent for Ministers in Victoria to exercise any prerogative of Her Majesty the Queen, except through the Governor of the colony, or at all events with his acquiescence. And I go further, and contend that Ministers cannot, even with the acquiescence of the Governor, exercise any prerogative

109 "A Copy of the Report of the Arguments and Judgment in the case of A Toy v Musgrove – Supreme Court of Victoria", which was a return to an order of the Legislative Assembly dated 9 October 1888; the hearing spanned from Tuesday 10 July 1888, until Friday, 13 July 1888.

110 Ibid 22.

other than lies within the limits of his Excellency's commission.

The case attracted considerable attention from the colonial newspapers. It could hardly be said that the matter was not known, at least in a general sense, to the leading political actors of the day. Newspapers from one side of the continent to the other reported on the case and commented upon its significance. The fact that the subject matter of the case was immigration, and the inability of the colonial administrations to restrict the influx of what were then considered undesirable immigrants – the Chinese – meant that the newspapers were naturally attracted to reporting the case.

The parties brought to the attention of the Full Court most, if not all, of the leading works on the prerogatives of the Crown and related constitutional literature.[111]

Toy v Musgrove is a comprehensive decision of the Supreme Court of Victoria. It stands as a significant milestone in the career of Attorney-General, and then Chief Justice, George Higinbotham. Both the plaintiff and the defendant were represented by the most able counsel in the Colony. The Full Court gave judgment for the plaintiff and divided four to two. For the purposes of this chapter, and given the express reliance that the framers (especially Henry Wrixon) placed upon the case in formulating the constitutional language of what eventually became section 64 of the Constitution, it is necessary to consider in detail the reasons for judgment of each of the six judges who heard the case. This jurisprudence illustrates the historical backdrop to the drafting of the Constitution – especially the drafting undertaken at the 1891 Convention in Sydney. Each judge's consideration of what, if any, of the Sovereign's prerogatives had been delegated to the Governor of Victoria, and what, if any, provision or feature of the Victorian Constitution –

111 The parties drew to the Court's attention, and the judges individually considered, the following works: Chitty's *Prerogatives of the Crown*, Blackstone's *Commentaries*, May's *Constitutional History of England*, Dicey's *The Law of the Constitution*, Todd's *Government of British Colonies*, Todd's *Parliamentary Government* , Kent's *Commentaries on American Law*, de Lome's *English Constitution,* and Hearn's *Government of England* . The Full Court was also referred to the earlier decision of the Privy Council of *Musgrave v Pulido,* and the earlier English decisions that were considered in *Musgrave v Pulido*: *Hill v Bigge* and *Cameron v Kyte*.

The Constitution Act, as amended by *The Constitution Statute*, lawfully devolves or invests the Governor the prerogatives of the Crown, will now be considered in detail.

Chief Justice Higinbotham

Higinbotham CJ's judgment is consistent with His Honour's reputation as a radical. His Honour's judgment "forms a sort of link between Higinbotham, Chief Justice, and Higinbotham the practical politician".[112]

After reciting the factual background to the litigation, Higinbotham CJ identified that the pleadings disclosed two questions of law that are "distinct and distinguishable"[113] which have been relied upon by the defendant, the Collector of Customs. The first defence "denies the jurisdiction of the Court"; the second defence presents as "an answer to the action on the merits".[114] The first defence is that the acts of the defendant, having been ratified and adopted by the Colonial Government of Victoria, are an act of state, and are consequently not cognizable in the municipal courts of Victoria.[115] In acknowledging that "all the prerogatives and powers of the Sovereign are not vested by law in the Queen's representative in Victoria",[116] Higinbotham CJ found that a Victorian Minister of the Crown cannot advise the Governor to exercise those prerogatives that are associated with acts of state (declaring war and peace, entering into treaties with foreign powers, engaging in diplomatic relations). Therefore, as a Minister of the Crown for Victoria can only exercise those powers vested by law in the Governor, consequently, "the power to do an act of state does not appear to be one".[117]

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112 E Morris, *A Memoir of George Higinbotham: An Australian Politician and Chief Justice of Victoria*, 265.

113 (1888) 14 VLR 349, 372.

114 (1888) 14 VLR 349, 375.

115 (1888) 14 VLR 349, 375.

116 (1888) 14 VLR 349, 376-377.

117 (1888) 14 VLR 349, 377.

Turning to the second line of defence advanced by the defendant, the learned Chief Justice began:[118]

> In England all the prerogatives and powers of government are lodged absolutely in the Sovereign. The Sovereign's responsible advisers have no legal powers of government whatever vested in them. They have the right to advise the Sovereign, and it is their duty to obey, and to carry into executive act, the commands of the Sovereign, founded upon such advice. *"The Constitution Act,"* following the English exemplar, creates and vests in the Governor certain powers, but none in his advisers. The Governor is appointed by the Sovereign, and he derives his constitutional powers from "The Constitution Act," to which the Sovereign has assented. He is, therefore, properly styled and regarded as the representative of the Crown, in his character as the depositary of his statutory powers. Victorian Ministers are appointed by the Governor. They have no legal powers of government whatever vested in them by "*The Constitution Act*."

After discussing the defendant's submission that there is a prerogative to prevent aliens from landing on British soil, and noting that the "kindred institutions of the United States of America"[119] have recognised such a right, nevertheless, Higinbotham CJ formed the view that "it is unnecessary … to consider whether the right to exclude aliens is, or is not, a continuing prerogative of the Crown of England".[120]

The Chief Justice then identified the next question that emerged: whether a power equivalent to this prerogative had, or had not, been vested by law in the representative of the Crown in Victoria, and can be exercised by the representative of the Crown upon the

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118 (1888) 14 VLR 349, 373.
119 (1888) 14 VLR 349, 378.
120 (1888) 14 VLR 349, 379.

advice of his responsible Ministers.[121] His Honour recognised that this question "raises for the first time in this Court constitutional questions of supreme importance".[122]

Having declined to form a concluded view on the continued existence, or otherwise, of a prerogative to exclude aliens, Higinbotham CJ said:[123]

> We are called upon for the purpose of adjudicating upon the rights of the parties in this case to ascertain and determine what is the origin and source of the constitutional rights of self-government belonging by law to the people of Victoria, and, if such rights exist, what is the extent and what are the limits assigned to them by law.

In conducting that adjudication, Higinbotham CJ traced the source of the Governor of the Colony's (and the Executive Government of the Colony's) lawful authority to the Imperial statute law; *The Constitution Act*, as amended by *The Constitution Statute*. In defining the Governor's authority as flowing from *The Constitution Act*; which "cannot lawfully be interfered with by either Her Majesty or Her Majesty's Imperial advisers",[124] the Chief Justice described the Governor's authority as a "new and distinct authority",[125] which is "for all purposes within the scope of the Act of the Victorian Legislature, the local Sovereign of Victoria".[126] He expressly rejected the notion that the Governor's authority is of a "dual character";[127] that is the Governor's authority is not a composite of *The Constitution Act*, and the Royal Commission and Instructions. Therefore, in adjudicating as to the constitutional rights of self-government belonging by law to the people of Victoria,

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121 (1888) 14 VLR 349, 379.
122 (1888) 14 VLR 349, 379.
123 (1888) 14 VLR 349, 379.
124 (1888) 14 VLR 349, 381.
125 (1888) 14 VLR 349, 381.
126 (1888) 14 VLR 349, 381.
127 (1888) 14 VLR 349, 381.

his Honour said "we are compelled to the conclusion that *The Constitution Act*, as amended and limited by *The Constitution Statute*, and in that Act alone, we must look for the legislative grounds of the self-governing powers of this people".[128] If they are not to be found in that Act, or cannot be ascertained and defined with reasonably sufficient certainty in that Act alone, then Higinbotham CJ concluded that those constitutional rights do not exist.[129]

Acknowledging the "momentous questions" being considered – the extent of the powers assigned to the representative of the Crown in Victoria, and the Ministers of the Crown – his Honour accepted that the "answer may possibly depend upon the extent which may be permitted to the field of judicial vision".[130] In answering the question as he has formulated it, Higinbotham CJ's method of interpretation was to look to history and the circumstances of the enactment of *The Constitution Act*. He elevated the subjective intentions of the drafter of the Act – his predecessor (both as Attorney-General and Chief Justice), Sir William Stawell, to the first relevant consideration in defining the scope of the Act – putting aside what he described as "[t]he general rule that the Parliamentary history of an enactment is not admissible to explain its meaning"[131] because "the framer of a Bill is known to have had special qualifications for his task".[132]

Ultimately, after having considered these factors, and applied rules of statutory construction, the Chief Justice summarised his, quite frankly, radical views as to the second question asked of the Court – what are the origins and source of the constitutional rights of self-government belonging by law to the people of Victoria, and, if such rights exist, what

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128 (1888) 14 VLR 349, 385.
129 (1888) 14 VLR 349, 385.
130 (1888) 14 VLR 349, 386.
131 (1888) 14 VLR 349, 387.
132 (1888) 14 VLR 349, 387.

was the extent and what are the limits assigned to them by law? His Honour concluded that:[133]

> … *"The Constitution Act"* as amended and limited by "*The Constitution Statute"* is the only source and origin of the constitutional rights of self-government of the people of Victoria.

And that:[134]

> ... the Executive Government of Victoria possesses and exercises necessary functions under and by virtue of *"The Constitution Act"* similar to, and co-extensive, as regards the internal affairs of Victoria, with the functions possessed and exercised by the Imperial Government with regard to the internal affairs of Great Britain.

Justice Kerferd

Justice Kerferd also dissented. Like Higinbotham CJ, Kerferd J was a former Attorney-General, and perhaps brought to his judicial opinion his experience as a former member of the colonial legislature. In similar terms to Higinbotham CJ, Kerferd J stated the competing arguments in these terms:[135]

> … the question for our decision was narrowed down during the argument to a claim on behalf of the Crown that *"The Constitution Act,"* or the powers derived under it, must be interpreted as conferring all the prerogatives and powers necessary for the administration of the law and conduct of public affairs in this

133 (1888) 14 VLR 349, 396.
134 (1888) 14 VLR 349, 397.
135 (1888) 14 VLR 349, 406.

> colony, including the right to exclude aliens. On the other hand, the plaintiff denies that any prerogative other than those expressly specified in *"The Constitution Act,"* 19 Vic., and the Governor's Commission, can be exercised here by responsible Ministers of the Crown.

Kerferd J answered the question this way. The Constitution of Victoria was created by and under the authority of the Imperial Act, 18 and 19 Vic c. 55. That Act delegated to the Legislature of Victoria the authority to repeal, alter, or vary all or any of the provisions of that Act, and to substitute others in lieu thereof. Quoting Dicey, Kerferd J said that the Legislature of Victoria "is a 'subordinate' assembly, because its powers are limited by the legislation of the Imperial Parliament; it is a constituent assembly, since it can change the articles of the Victorian Constitution".[136] Recognising that "the administrative acts of responsible Ministers (in the exercise of those discretionary powers of Government vesting in the Royal Prerogative) have been frequently challenged".[137] Kerferd J proffered the view:[138]

> … that the Constitution under which Victoria is governed rests on a wider basis than the actual terms of "*The Constitution Act,"* 19 Vict., would appear to indicate. If the plaintiff's contention were a sound one, it would follow that the prerogatives forming part of the common law, which are separate from those in connection with the Legislature, and which before and since the inauguration of responsible government have been enforced by this Court, have been so enforced illegally. For if the Crown is restricted to the use of those prerogatives mentioned in *"The Constitution Act"* and the governor's Commission, then all other prerogatives must be deemed to be excluded. I can find no authority in

136 (1888) 14 VLR 349, 407; Dicey, *The Law of the Constitution*, Second Edition, 101 and 102.
137 (1888) 14 VLR 349, 409.
138 (1888) 14 VLR 349, 409.

> support of such a contention, but I think there is some authority the other way.

His Honour asked the question "what was the intention of the Imperial Parliament in passing the Act 18 and 19 Vic c. 55, of which our Act 19 Vic formed the schedule?"[139] His answer was: "to grant to the people of Victoria responsible government", observing that:[140]

> A glance at the Act 19 Vic. will show that its provisions were intended to enable the Parliament called into existence to work out the necessary machinery for the purpose of giving full effect to the operation of responsible government, and that it was not intended thereby to restrict the government to the use of the prerogatives mentioned, because there are prerogatives not mentioned which are absolutely essential to give life to responsible government.

The system of responsible government, his Honour said, "would be utterly unworkable without the discretionary prerogative powers vested in the Crown, and which are not provided for by any [s]tatute".[141] Kerferd J concluded that the prerogative of excluding aliens existed, and was a prerogative that the law must take cognizance of,[142] and was one that the Government of Victoria could exercise.[143] His Honour arrived at this conclusion as he said the question as to whether the Government of Victoria can exercise such a prerogative power is a matter between the Colony and the mother country.[144] From an international law point of view, the act of the Government of Victoria would be the act of

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139 (1888) 14 VLR 349, 410.
140 (1888) 14 VLR 349, 410.
141 (1888) 14 VLR 349, 410.
142 (1888) 14 VLR 349, 411.
143 (1888) 14 VLR 349, 411-412.
144 (1888) 14 VLR 349, 411-412.

the British nation[145] – so long as the Government of Victoria's acts are within the authority of the law, Kerferd J concluded that the Supreme Court is not concerned as to the grounds of justification.[146]

Justice Williams

Williams J delivered the leading judgment for the majority. His Honour found for the plaintiff, Ah Toy, and set down the maxims of law which this dissertation seeks to demonstrate that the framers were aiming to correct (or avoid) in respect of their establishment of the Executive Government of the Commonwealth.

As to the act of state defence, Williams J said that it is no defence at all as it can only be a defence if ratified by a sovereign power.[147] He said:[148]

> … this colony is not a Sovereign power; as far as we are concerned, the Imperial Government alone occupies that position, nor is the Sovereign power vested in the Governor of this colony; and to render the act complained of an act of State...

His Honour approvingly quoted the opinion of Lord Wensleydale in *Cameron v Kyte* when Williams J said:[149]

> If the Governor of this colony has the Sovereign power vested in him, it is clear that outside his commission there is nothing else which so vests it. But there is no such delegation, or anything approaching to it contained in his commission.

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145 (1888) 14 VLR 349, 412.

146 (1888) 14 VLR 349, 412.

147 (1888) 14 VLR 349, 418.

148 (1888) 14 VLR 349, 413.

149 (1888) 14 VLR 349, 414; quoting in part, and approving *Cameron v Kyte*, (1835) 3 Knapp 332; 12 ER 678.

> The Governor of this colony is clearly not a Viceroy, as is commonly supposed, and the term Vice-Regal is inappropriate to the position he occupies. "He is merely an officer of the Imperial Government, with a limited authority from the Crown, and his assumption of an act of Sovereign power out of the limits of the authority so given to him is purely void, and the Courts of the colony over which he presided could give it no legal effect."

Williams J (who publicly said in 1888 that Australia should separate from Great Britain),[150] said that Higinbotham CJ's assertion that the Victorian Government had full authority over internal affairs is "a proposition which is not only startling but positively unintelligible to me".[151] With "great reluctance", his Honour concluded:[152]

> I have been for years, in common with, I believe, very many others, under the delusion (as I must term it) that we enjoyed in this colony responsible government in the proper sense of the term. I awake to find, as far as my opinion goes, that we have merely an instalment of responsible government. It would have given me sincere satisfaction to have been enabled, in pronouncing my judgment, to have expressed my concurrence with the conclusion of the Chief Justice upon this point; but I have felt myself forced as a lawyer, construing our law as a lawyer, to differ from him on this most important question, namely, as to what is the system of responsible government which we have had granted to us in Victoria.

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150 G Serle, R Ward (eds), *Australian Dictionary of Biography* (1966) Vol 6, 404.

151 (1888) 14 VLR 349, 419; as observed by C Parkinson, "George Higinbotham and Responsible Government in Colonial Victoria" [2001] *Melbourne University Law Review* 6.

152 (1888) 14 VLR 349, 416.

Williams J assumed that the prerogative to exclude aliens did exist in England, and has not fallen into disuse,[153] but his Honour observed under the Victorian Constitution "… that *a* system or *a* measure of responsible government is created by the Act",[154] not a full system and measure of responsible govenent. Therefore, Williams J concluded that: "... under "*The Constitution Act*," we do not possess the power which forms the principal subject matter of the defence now under consideration".[155]

Justice Holroyd

Holroyd J joined the majority. His Honour's view was that *The Constitution Act* vested the prerogatives of the Crown in the Governor and Government of the Colony of Victoria. His Honour observed that "... nobody has disputed the Attorney-General's proposition, that by international law every nation has the right of excluding foreigners from its territory, as well as friends as enemies",[156] and that "[t]he power to exclude aliens in time of peace, both by forbidding them to enter and by compelling them to depart the realm, has been claimed for the Crown as part of its prerogative down to quite modern times".[157] In terms of "responsible government", he said:[158]

> ... we must not be misled by abstract terms. No such thing as responsible government has been bestowed upon the colony by name; and it could not be so bestowed. There is no cut-and-dried institution called responsible government, identical in all countries where it exists.

153 (1888) 14 VLR 349, 415.

154 (1888) 14 VLR 349, 419 (original emphasis); by "Act", his Honour is referring to the Victorian Constitution, *The Constitution Act*.

155 (1888) 14 VLR 349, 421–422.

156 (1888) 14 VLR 349, 423.

157 (1888) 14 VLR 349, 423.

158 (1888) 14 VLR 349, 428.

In respect of the prerogative powers, Holroyd J concluded:[159]

> Powers of this class [that is, powers of a prerogative nature] having been bestowed in express terms, we ought to presume according to the ordinary rule of construction that no others of the same class were intended to pass. The rule is not one of universal application; but in the present instance it should be rigidly applied, inasmuch as it is still a fundamental maxim that the Crown is not bound by any Statute unless expressly therein named, and, as a corollary, the Royal prerogative cannot be touched except in so far as therein expressed.

Justice á Beckett

In a short set of reasons, substantially concurring with Holroyd J,[160] á Beckett J said that in assuming that the right to exclude aliens subsisted in England as part of the prerogative when the "*Constitution Act*" was passed:[161]

> I can find nothing in the Act, or in the system of Government which it originated, authorising the exercise of this right by the advice of Ministers in Victoria. It was argued that the authority must be given because responsible government was given, as if the phrase "responsible government" had a definite comprehensive meaning, necessarily including the power in question. The phrase has to my mind no such force.

Justice Wrenfordsley

The fourth member of the majority was Wrenfordsley J, who was a very experienced colonial judge.[162] His Honour also considered the question: to what extent have the

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159 (1888) 14 VLR 349, 429.
160 (1888) 14 VLR 349, 435.
161 (1888) 14 VLR 349, 434.

prerogative rights of the Crown been either granted or lessened by *The Constitution Act*?[163] His Honour remarked that he was "not aware of any authority to the effect that in a settled colony, like Victoria, the Act of Constitution carries with it powers outside or beyond the exact terms of the grant itself".[164] Wrenfordsley J said:[165]

> I have endeavoured to consider very carefully the several powers and provisions conferred by the Act of Constitution, and I fail to see that they go further than to provide for a perfect scheme of local government, limited to its internal relations. When I say a perfect scheme, I mean a system of responsible self-government, complete within itself, so far "as representative institutions of a popular character can be said to be perfect."

Wrenfordsley J approvingly cited the earlier opinions of the Privy Council:[166]

> Lord Brougham, in *Hill* v. *Bigge* and which is cited in the comparatively recent case of *Musgrave* v. *Pulido*, says- "If it is said that the Governor of a colony is *quasi* Sovereign, the answer is, that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute his specific powers with which that commission clothes him".

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162 Sir Henry Wrenfordsley was, successively, a puisne judge of Mauritius, the Attorney-General of Jamaica, the Chief Justice of Western Australia, an acting justice of the Supreme Court of Tasmania, and an acting justice of the Supreme Court of Victoria. See T S Louch, "Wrenfordsley, Sir Henry Thomas (1825-1908)", *Australian Dictionary of Biography*, 1976, Vol 6.

163 (1888) 14 VLR 349, 437.

164 (1888) 14 VLR 349, 437.

165 (1888) 14 VLR 349, 439.

166 (1888) 14 VLR 349, 439.

Taking a slightly different view of the correct approach, Wrenfordsley J said that a Governor acts under the express power from the Crown; and "in the case of a colony possessing representative institutions, he only represents the prerogative of the Crown in respect of those instances which are directly included in the terms of his commission...".[167]

Wrenfordsley J arrived at the conclusion that the status of the Colony of Victoria "is of a much more limited character than is suggested by the words of the plea".[168] Wrenfordsley J opined that:[169]

> … there does exist in this colony a form of Government, consistent with a full grant of representative institutions, limited, no doubt, in the application of prerogative rights, but possessing ample power with respect to all internal administration …
>
> ... this colony did not as a State receive any recognition from the Imperial Government with respect to its external relations; nor could such a recognition take place under its existing connection with the mother State; but I think that, for the purpose of all necessary intercourse with other countries, the rights of the Crown have been sufficiently reserved.

His Honour concluded that given the prerogative the Crown pleaded was a prerogative which goes to the external relations, it was not prerogative that is exercisable by the Governor or government of the Colony, and therefore the only authority with the power to exercise the prerogative claimed was Her Majesty's Imperial advisers.[170]

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167 (1888) 14 VLR 349, 440.
168 (1888) 14 VLR 349, 441.
169 (1888) 14 VLR 349, 442.
170 (1888) 14 VLR 349, 442.

V *MUSGROVE V TOY*

The sixth precedent that the delegates to the 1891 Convention were aware of was the appeal of *Toy v Musgrove* to the Judicial Committee of the Privy Council in *Musgrove v Chun Teeong Toy* (*Musgrove v Toy*)[171]. The appeal was heard on 13, 14 and 19 November 1890, and judgment was delivered on 18 March 1891 – less than a month before the delegates to the First Convention assembled in Sydney to begin drafting a Bill to federate the Australian colonies. To hear the appeal, the Board was constituted by a particularly strong composition of Lords: the Lord Chancellor, Lord Halsbury LC; the former Lord Chancellor in the last Gladstone Administration, Lord Herschell; Lord Hobhouse; Lord Macnaughten; Sir Barnes Peacock; Sir Richard Cough and Mr Shand (Lord Shand of Scotland).

The appellant, Musgrove, the Collector of Customs, was represented by Sir Horace Davey QC (subsequently Lord Davey), who was the leader of the London equity bar and was an highly experienced and well regarded advocate before the House of Lords and the Board.[172] Henry Wrixon QC travelled to London to appear with Davey. The respondent was represented by Sir Walter Phillimore QC (subsequently Lord Phillimore), and juniored by JW McCarthy. Both parties had the advantage of very distinguished and experienced counsel. Judgment was delivered by the Lord Chancellor. The Board gave judgment for the appellant – but not for the constitutional grounds (act of state, and exercise of the prerogative) which were the appellant's defence, both in the Supreme Court of Victoria and at the Judicial Committee of the Privy Council. Rather, the Board decided the case by having regard to only the enactments of the Parliament of Victoria – that is, the *Chinese Immigrants Statute 1865* and the *Chinese Act 1881*.

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171 [1891] AC 272.

172 In his memoirs, the former Lord Chancellor Viscount Haldane described Horace Davey as "the finest advocate on pure points of law that I have ever seen. In legal matters he had a mind like a razor, and he was accurate to the last degree", and observed that: "It was in the House of Lords and the Judicial Committee of the Privy Council that his power became apparent": *Richard Burdon Haldane: An Autobiography*, 35 and 36.

The plaintiff arrived on the *Afghan* in the Port of Melbourne, which was carrying 268 Chinese immigrants on board, being 254 more Chinese immigrants then was permitted under the statute that a vessel might lawfully bring into the Port of Melbourne. Lord Halsbury LC formulated the issue for the Board as "whether, upon these facts, the plaintiff has shewn that there was a breach of duty towards him committed by the defendant; and that a legal right which he possessed has been infringed".[173] The defendant's submission was that the plaintiff was ready, willing and able to pay the £10 sum, payable under s 3 of the *Chinese Act 1881*, and the defendant refused to receive the sum. But as the Lord Chancellor said, "it is obvious that this will not aid him, unless he can establish that there was a legal obligation on the part of the collector to receive the sum, and that, as the refusal to receive it constituted a breach of duty.[174] True it was that a subject of the Emperor of China needed to pay the £10 sum upon landing, but against that, the Board was of the view that "the manifest object of the code was to prevent … what the legislature thought to be an excessive number of Chinese, landing in the colony, and not merely to impose a tax".[175] The Board concluded that:[176]

> … where the master of a vessel has committed an offence by bringing a greater amount of Chinese into a port of the colony than the statute allows, he can have no right to require the collection of customs to receive payout in respect of such injustice...

As this was the case, the plaintiff's cause should fail, said the Lord Chancellor, as the plaintiff could only make out his cause if it could be shown that the refusal to receive the

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173 [1891] AC 272, 280.
174 [1891] AC 272, 280.
175 [1891] AC 272, 281.
176 [1891] AC 272, 280.

payment was unlawful. Having dispensed with this dispute between the parties, their Lordships therefore did:[177]

> … not think it would be right on the present appeal to express an opinion upon which the question which was elaborately discussed in the learned judgments delivered in the Court below – viz., what rights the executive government of Victoria has, under the constitution conferred upon it, derived from the Crown. It involves important considerations and points of nicety which could only be properly discussed when the several interests concerned were repeated, and which may never become of practical importance, and their Lordships feel bound, upon the grounds which they have indicated, to abstain from pronouncing upon them on the present occasion.

Given that the Judicial Committee abstained from considering the accuracy of the majority's reasons in *Toy v Musgrove* in respect of the question of the constitutional rights of the executive government of the colony, the issue of the source and nature of a colonial governor's powers remained unresolved by the then ultimate appellate tribunal of the Empire. The Board could have placed the issues beyond dispute, but in declining to express an opinion, left Crown law officers throughout the Empire with two competing views on if, and how, the prerogatives of the Crown were devolved and invested in a colonial government.

The Privy Council proceedings were closely followed in Australia. Leave to appeal to the Privy Council was granted in January 1889.[178] It was known in April 1890 that the Board would likely hear the appeal in November of that year[179], and in June 1890, it was reported that the Attorney-General of Victoria was not likely to travel to London for the

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177 [1891] AC 272, 283.

178 "Ah Toy Versus Musgrove", *The Mercury*, 25 February 1889, 3.

179 *South Australia Register*, 11 April 1890, 5.

appeal.[180] But by August 1890, Mr Wrixon was being fêted at a luncheon by his fellow parliamentarians prior to his departure for London to represent the Colony before the Board.[181] He arrived in London in late October 1890.[182] Interestingly, the Tasmanian press reported that "owing to the delay of counsel instructed by Ah Toy, the case will probably be heard ex parte on 15 November proximo",[183] whereas the Victorian press presented a different picture: "In consequence of the delay on part of the Victorian Government in appointing counsel to represent the plaintiff, it is possible that the case will be heard by the Privy Council ex parte on December 15".[184]

In early 1890, there was an issue as to whether Wrixon would appear for the Colony, having vacated the office of Attorney-General whilst in transit between Melbourne and London as a consequence of the resignation of the ministry.[185]

On 5 November 1890, *The Argus* reported that Sir Horace Davey QC, the former Attorney-General of England would appear with Henry Wrixon in the appeal, and on 7 November 1890, the *Sydney Morning Herald* reported that Sir Walter Phillimore would be the leader of Ah Toy's case.[186]

On 17 November 1890, *The Argus* reported that "[t]he Court seemed to be in favour of the view that it is a prerogative of the Crown to prevent the admission of aliens".[187] This view was also reported in Sydney;[188] but by 21 November 1890, the Victorian press was

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180 *Portland Guardian*, 11 June 1890, 2.
181 "Colonial Telegrams' Victoria", *South Australian Register*, 28 August 1890, 6.
182 *The Mercury*, 29 October 1890, 2.
183 *The Mercury*, 29 October 1890, 2
184 *The Argus*, 29 October 1890, 5.
185 "Chinese Exclusion", *Barrier Miner*, 5 November 1890, 3; *The Advertiser*, 5 November 1890, 5.
186 "The Chinese Restriction Case", *The Sydney Morning Herald*, 7 November 1980, 5.
187 *The Argus*, 17 November 1890, 5.
188 *Sydney Morning Herald*, 17 November 1890, 7.

prophesising that it was "probable that the Court will ignore the constitutional aspects of the case".[189]

Before departing London, the Adelaide press reported that Wrixon was "investigating precedents in reference to Canadian federation in view of the expected establishment of federation in Australia".[190] As does the Melbourne press.[191] At Christmas 1890, a degree of frustration at the delay in the Privy Council giving judgment is evident in the Sydney press.[192]

The Brisbane press carried a lengthy interview with Wrixon upon his return to Melbourne but prior to the publication of the Privy Council's judgment.[193] Judgment was delivered by the Judicial Committee of the Privy Council on 18 March 1891, and on 19 March 1891, *The Argus* reported upon the Colony's victory, but that the Board had expressed no opinion with regard to the prerogative rights conferred under the Victorian Constitution.[194]

The Australian press repeated the editorial of *The Times* in London which said that it would have been a "misfortune" if the judgment "hampered the free national growth of constitutional relations between Great Britain and the great autonomous colonies".[195]

On 20 March 1891, the *West Australian* reported on the Colony of Victoria's victory and detailed the competing submissions, including Henry Wrixon's submissions regarding the prerogative.[196] Even the *Cairns Post* reported that "[t]he Privy Council has reversed the decision of the Colonial judges".[197] Also in the West, the *Western Mail* editorialised that

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189 *The Argus*, 21 November 1890, 5.
190 *South Australian Register*, 11 December 1890, 5.
191 *The Argus*, 11 December 1890, 7.
192 *Sydney Morning Herald*, 24 December 1890, 7.
193 *The Brisbane Courier*, 11 March 1891, 7.
194 *The Argus*, 19 March 1891, 7.
195 *The Brisbane Courier*, 20 March 1891, 5; *Barrier Miner*, 20 March 1891, 2.
196 *The West Australian*, 2001 and 1891, 3.
197 *The Cairns Post*, 21 March 1891, 2.

the decision of the Privy Council had "been awaited with much interest by Australians, as well as by those ... who more generally concern themselves with the rights and powers acquired by the self-governing colonies".[198] Indeed, the Sydney papers recorded interest in the *Musgrove v Toy* case as being Empire-wide, with Canada making preparations for the introduction of similar legislation that is in operation in Australia, as a result of the decision of the Privy Council,[199] and so did the *South Australia Register*.[200] The judgment also came to the attention of the Supreme Court of the United States in *Fong Yue Ting v United States*.[201]

In 1904, memory of the Privy Council decision had not yet disappeared. *The West Australian* reported on a case in Capetown where *Musgrove v Toy* was applied in what was described as a "Jewish Alien Immigration case". The *West Australian* reminded readers that *Musgrove v Toy* was a cause celebre.[202] The *Sydney Morning Herald* carried a similar report.[203]

Given the widespread reporting of the case, and the importance of the constitutional issues involved, we may infer that *Toy v Musgrove*, and *Musgrove v Toy*, were both decisions that were widely known, and contributed greatly to the constitutional jurisprudence in the colonies prior to 1891. As a matter of legal history, they are instructive about the existing state of the common law, and of the textual choices that confronted the delegates to the Convention in Sydney in 1891.

198 *Western Mail*, 28 March 1891, 6.
199 *Sydney Morning Herald*, 30 March 1891, 4.
200 *South Australia Register*, 30 March 1891, 5.
201 149 US 698, 710-711 (Gray J).
202 *The West Australian*, 1 April 1904, 5.
203 *Sydney Morning Herald*, 1 April 1904, 7.

CHAPTER FOUR

THE FRAMERS AND THEIR PREROGATIVE

I INTRODUCTION

Originalism, as a school of constitutional interpretation, is conventionally thought to be a quintessentially American idea. Originally an American scholar, Dr Lael Weis, has argued that originalism (understood through the prism of formalism) is just as much an Australian idea as it is to the disciples of Antonin Scalia.[1] What the framers intended the constitutional text to mean, or how they intended the constitutional machinery to operate, is more than just interesting; authorial intention is instructive to the interpretation of the text and structure of the Constitution.

This Chapter sets out what evidence there is as to how the framers thought ss 2, 61 and 64 of the Constitution would operate – particularly what the framers thought they were doing when they amended clause 4 (subsequently s 64) to add the affirmation that the Federal ministers "shall be the Queen's Ministers of State for the Commonwealth".

In searching for authorial intention, unlike the American Founders, whose best record of their deliberations was James Madison's *Notes of Debates in the Federal Convention of 1787*, the framers of the Australian Constitution left the complete transcripts of the two Federation Conventions – relevantly described as the *Official Record* or *Official Report* of the First Convention, or session of the Second Convention. The adoption by the framers of the parliamentary processes familiar to them as colonial politicians – particularly the

1 "Originalism in Australia", an address to the Samuel Griffith Society's annual conference, 12 August 2016, Adelaide.

process of submitting draft legislation to the committee phase – resulted in a clause-by-clause consideration of the draft Constitution, ensuring the creation of a detailed transcript of the debate associated with each provision.

Through examining the contents of the Debates, an appreciation can be developed as to how the framers sought to textually recognise or affirm the continued operation of the prerogative, or understood the prerogative to operate.

This chapter considers in detail the *Official Records* of the Constitutional Conventions of the 1890s in so far as the contents of the Debates reveal the location of the textual recognition or affirmation of the royal prerogatives, or the meaning of the executive power of the Commonwealth.

It does this not by way of looking backward; that is examining ss 2, 61 and 64, to ascertain where the text came from in a rather decontextualised fashion. Rather, this chapter examines the drafting history of those sections looking forward, that is, how they were changed to meet the competing desires of the framers during the Conventions process. The "looking backwards" method is utilised by French CJ in the *Pape* decision, where his Honour traced the drafting history of s 61.[2] In this work, the day by day consideration of the draft Commonwealth Bills as they emerged from the drafting committees of the Conventions is considered. The committee of the whole, or in-committee phase of consideration of individual draft provisions allows the nuances of the framers' work to be identified and explored.

Whilst this chapter traces the relevant portions of the Debates, the best and most nuanced explanation of what the framers intended can only be obtained from reading the Debates word-for-word, which, considerations of space prevent this author from setting out *verbatim*.

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2 (2009) 238 CLR 1, 57-58 [119]-[121].

II THE USE OF THE OFFICIAL REPORTS AND OFFICIAL RECORDS OF THE FEDERATION CONVENTIONS IN INTERPRETATION

Central to this thesis is the assertion that recourse to words spoken at the Federation Conventions is not just possible, but instructive. In terms of the High Court's practice, recourse to the *Official Reports* and *Official Records* of the Conventions for the purposes of constitutional interpretation has not always been possible. During the hearing of *Municipal Council of Sydney v Commonwealth,*[3] Griffith CJ said of the Debates:[4]

> They are no higher than parliamentary debates, and are not to be referred to except for the purpose of seeing what was the subject-matter of discussion, what was the evil to be remedied, and so forth.

Speaking extra-judicially, Heydon J has said of that statement of Griffith CJ, that the High Court "[h]ereafter adopted the practice of not referring to the Convention Debates".[5] The reasoning behind this rule or practice of the High Court isn't too difficult to fathom. The founding justices of the High Court – Sir Samuel Griffith, Sir Edmund Barton and Justice Richard O'Connor – were all significant figures in colonial politics, and Barton and O'Connor were both members of the first House of Representatives and Senate respectively. Griffith, Barton and O'Connor were all delegates to the Conventions, and were literally *the drafters* (as members of the drafting committees) of the constitutional text. All three men had their own views as to what the constitutional text meant; views that were fortified by being participants in the text's creation. To permit parties to quote one Convention delegate off against another as part of a party's submissions would have run the risk of the original members of the Court re-arguing what the three justices had argued

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3 (1904) 1 CLR 208.

4 (1904) 1 CLR 208, 213-214.

5 J D Heydon, "Theories of Constitutional Interpretation: a taxonomy", 2007 Sir Maurice Byers Lecture (3 May 2007), New South Wales Bar Association, *Bar News*, Winter 2007, 12, 15.

as Convention participants. There was an understandable reason to not permit litigants to ask the Court to prefer the words of one delegate over another. It was also said to be contrary to the common law tradition.[6] Thereupon, that rule or practice remained for 85 years.

That approach to the use of the Debates by the High Court remained effectively undisturbed until it was emphatically discarded in *Cole v Whitfield.* All seven justices opined that:[7]

> Reference to the history [including the Convention Debates]… may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.

Cole v Whitfield concerned the meaning of the expression "absolutely free" in s 92 of the Constitution; it more than just opened the door to the use of the Convention Debates by the High Court in constitutional interpretation, it "thereby settled a long running, if not especially passionate, debate".[8]

The High Court continues to have recourse to the Debates. In particular, the High Court has had recourse to the Debates when considering questions in relation to the interpretation of Chapter II of the Constitution generally, and the executive power of the Commonwealth specifically. French CJ has been the member of the Court who has shown the greatest analytical interest in the executive power of the Commonwealth. In *Pape* French CJ made

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6 G Sawer, *Australian Federal Politics and Law, 1901-1929*, 329.

7 (1988) 165 CLR 360, 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

8 N Perram, R Pepper (editors), *The Byers Lectures 2000-2012*, 129.

extensive use of the Debates in considering the relationship between the executive power of Commonwealth and the appropriation of funds from the Consolidated Revenue Fund.[9] Gummow, Crennan and Bell JJ also approvingly made reference to the "scope of constitutional interpretation" and the use of "the successive draft bills for the *Constitution* which were debated in 1891, 1897 and 1898",[10] in the context of the operation of the appropriations power and its relationship to the executive power of the Commonwealth. Heydon J also spoke of the use of the framers' intentions.[11]

In respect of the use of history more generally (that is, not expressly in reference to the use of the Convention Debates), Gummow, Crennan and Bell JJ opined in *Pape* that knowledge of legal history is indispensable to an appreciation of the essential characteristics of the power of appropriation in the Constitution; and affords an understanding of the setting in which the Constitution was formulated. Their Honoude make the point of emphasising the importance of the words of Gleeson CJ in *Singh v Commonwealth.*[12] That "[a] knowledge of the law, including legal history is indispensable to an appreciation of their essential characteristics".[13] In *Singh*, Gleeson CJ said that:[14]

> The public record of the Convention Debates is evidence of what some people, involved in the framing of the Constitution, said about various drafts of the instrument. It is a partial record of the drafting history of most of the provisions of the Constitution. It reveals what some people understood, knew, believed, thought, or intended about the proposed instrument, and the circumstances surrounding some of the events involved in its preparation. For the reasons already given, what the record shows about the subjective beliefs or intentions of

9 (2009) 238 CLR 1, 56-58, [115]-[123].
10 (2009) 238 CLR 1, 75-76, [187] to [188].
11 (2009) 238 CLR 1, 148-149, [429]-[432].
12 (2004) 222 CLR 322, 331–332, [8]-[10].
13 (2004) 222 CLR 322, 332 [10].
14 (2004) 222 CLR 322, 337.

> some people may be interesting but, of itself, is not a relevant fact. Many people, in Australia and the United Kingdom, were involved, directly or indirectly, in decisions about the form of the Constitution. Not all of them participated in the Convention Debates. Furthermore, as at all gatherings of lawyers or politicians, those who had the most to say were not necessarily the best informed or the most influential. A search for the collective, subjective intention of the framers of the Constitution would be impossible, and the individual subjective intention of any one of them, if it could be established, would not be relevant, because it would not advance any legitimate process of reasoning to a conclusion about the meaning of the text. Nevertheless, the drafting history of the Constitution, including the record of the Convention Debates, may be capable of throwing light on the meaning of a provision. Whether this will be so depends upon the nature of the problem of interpretation that arises, the nature of the information that is gained from the drafting history, and the relevance of that information to the solution of the problem. Whether information is capable of assisting in the rational solution, by a legitimate process of reasoning, of a problem about the meaning of the text, depends upon the nature of the problem, and the nature of the information.

Similarly, in *Williams [No 1]*[15] the High Court made extensive use of the Debates in the interpretation of s 61 of the Constitution, and the executive power of the Commonwealth. Just as his Honour did in *Pape*, French CJ considered in significant detail the drafting history of s 61, as evinced by the Convention Debates and contemporaneous literature.[16] Heydon J (albeit in dissent) also made use of the drafting history.[17] In *Williams [No 2]* the

15 (2012) 248 CLR 156.

16 (2012) 248 CLR 156, 194 [40] to 205 [61].

17 (2012) 248 CLR 156, 296 [346] to 287 [349].

plurality further confirmed that "[t]he history of British constitutional practice is important to a proper understanding of the executive power of the Commonwealth".[18]

Additionally, in respect of construing s 64 of the Constitution, in *Re Patterson; ex parte Taylor*,[19] the justices of the High Court had reason to consider (and therefore deem relevant) the words used by the framers in the two Conventions relating to that provision.[20]

Chief Justice French has extra-curially criticised the search for "authorial intention", but at the same time emphasised the qualification that Griffith CJ placed upon the permissible use of the Debates in *Municipal Council of Sydney*.[21] The Chief Justice made his view plain: the application of ordinary principles of interpretation are entirely consistent with "the use of history including the Constitutional Debates to better understand the context and purpose of the language of the Constitution".[22]

Against these propositions, it is also important to observe that the High Court has previously (post-*Cole v Whitfield*) disavowed the use of the Convention Debates as an aid in constitutional interpretation. For example, the majority in the *WorkChoices case* was quite dismissive of the utility of the Debates in construing the corporations power.[23] Their Honours said:[24]

> To pursue the identification of what is said to be the framers' intention, much more often than not, is to pursue a mirage. It is a mirage because the inquiry assumes that it is both possible and useful to attempt to work out a single

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18 (2014) 252 CLR 416, 468 [80] (French CJ, Hayne, Kiefel, Bell and Keane JJ), Crennan J agreeing at 471 [99].

19 (2001) 207 CLR 391.

20 (2001) 207 CLR 391 at 398 [1] (Gleeson CJ), at 426-427 [106]-[109] (McHugh J), at 462 [215] (Gummow and Hayne JJ), and at 470 [267] (Kirby J). Additionally, in *Re Patterson; ex parte Taylor* Gleeson CJ speaks of the framers' purposes in broadly outlining in s 64 "some of the structural elements of a system of government" at 402 [13] and [14].

21 R S French, "Interpreting the Constitution – Words, History and Change" *Monash University Law Review* (2014) (Vol 40, No 1), 35, 38.

22 Ibid 43-44.

23 *New South Wales v Commonwealth* (2006) 229 CLR 1.

24 (2006) 229 CLR 1 at 97 [120] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

> collective view about what now is a disputed question of power, but then was not present to the minds of those who contributed to the debates. And even if a statement about the framers' intention can find some roots in what was said in the course of the Convention Debates, care must be taken lest, like the reserved powers doctrine, the assertion assumes the answer to the very question being investigated: is the law in issue within federal legislative power? For the answer to that question is not to be found in attempting to attribute some collective subjective intention to all or any of those who participated in the Convention Debates. And when it is said that a particular construction of the constitutional text does, or does not, accord with the framers' intention, the statement compares competing constructions of the Constitution, both of which must be based in its text, interpreted in accordance with accepted principles.

That said, the construction of ss 2, 61 and 64 of the Constitution, and the operation of the executive government of the Commonwealth, cannot be properly understood without having regard to the history of the Imperial executive, the executive governments of the Australian colonies at the time of Federation, and the authorial intention of (so far as it can be properly ascertained and attributed to) the framers.

III Responsible Government and the Prerogative

Fundamental to understanding the Constitutional Debates, and how the prerogative was recognised and affirmed in the constitutional text by the framers, is an appreciation of the ongoing debate about the establishment of responsible government within the new Commonwealth of Australia.

There is no provision in the Constitution that *expressly* states that the doctrine or system of responsible government (as that system had come to be known) is incorporated in the Constitution. It is only through a construction of the text and structure (aided by a knowledge of British constitutional practice and history) that one is able to form the view

that the Constitution seeks to establish for the Commonwealth a system of responsible government.

The great challenge for the constitutional drafters was to effectively blend together the Westminster system of responsible government with a bicameral legislature of co-equal powers.

The British system of responsible government – that is, where the officers of state who are charged with administering the executive government are drawn from the legislature (and politically answerable to the legislature) was, and remains, an organic constitutional institution.

In the 1890s, it was a known, accepted, and aspired to, method of government; but it was also known to be in a state of development. For example, the political convention that the head of government (the prime minister, premier, or chief secretary) should come from the lower house which represents the country, had yet to be fully developed and accepted. In the Imperial Parliament, it wasn't until the appointment of Arthur Balfour as prime minister in 1902 by Edward VII that the practice of commissioning a member of the House of Lords as prime minister and First Lord of the Treasury came to an end.

Whilst responsible government was still undergoing growth, the fundamental tenets of responsible government had taken foot throughout the Empire: that those who were charged with administering the executive government in the Sovereign's name were required to hold a seat in the legislature; and they were accountable to the legislature for their administration of the government. If the ministry lost the confidence of the lower house of the legislature, then the ministry was obliged to resign, or go to the country, that is, request that the Sovereign or the Sovereign's representative dissolve the legislature.

The framers clearly wanted to replicate the system of government that they were most familiar with in their respective colonies. The delegates to the First Convention in Sydney, and the Second Convention in Adelaide, Sydney and Melbourne were the principal political actors of their colonies. They were familiar with the ebb and flow of changes in ministries associated with the ordinary operation of responsible government.

Coupled with a desire to replicate responsible government, the framers sought to replicate the Connecticut Compromise of 1787, where the founders of the American Republic protected the interests of the "small states" in the new Republic by requiring that the United States' Senate comprise of equal representation from each of the States. As French CJ put it: "The tension between the operation of executive powers and functions under a system of responsible Cabinet government and a federal constitution with a bicameral legislature, one element of which was a States' House, represented a difficulty for some leading figures in the Federation movement".[25] G W Hachett said at the 1891 Convention in Sydney, "either responsible government will kill federation, or federation … will kill responsible government".[26]

Crennan J said that "[i]t has often been recognised that s 61 and, more generally, Ch II of the Constitution were shaped by the institution of responsible government and the exercise of executive power under the Westminster system of Britain, as at the date of Federation. Responsible government was seen then as a 'government under which the Executive is directly responsible to – nay, is almost the creature of – the legislature'".[27]

It is against this backdrop that two issues emerged. The first being how to reconcile responsible government with bicameralism consisting of chambers of equal powers to approve expenditure. The second issue that emerged is: even if responsible government were able to be replicated in the Federal Constitution, and, in some textual way, the organic convention be incorporated into the constitutional text, what powers and functions should those charged with administering the executive government have, and how are those

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25 *Williams [No 1]* (2012) 248 CLR 156, 203 [58] (French CJ).

26 *Con. Deb. Syd, 1891*, 280.

27 *Williams [No 1]* (2012) 248 CLR 156, 349 [508] (Crennan J), quoting *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 147 (Knox CJ, Isaacs, Rich and Starke JJ), who, in turn, were approving the words of Lord (Richard) Haldane, who, as a member of the House of Commons, introduced the Commonwealth of Australia Constitution Bill into the Imperial Parliament – to distinguish it from the United States Constitution. See also J Quick, R R Garran, *The Annotated Constitution of the Australian Commonwealth* (1907 edition), 703.

powers and functions textually recognised or affirmed (if at all) in the constitutional text? These two issues ought to be kept in mind.

Coupled with these questions is the repetitious use of the Supreme Court of Victoria's judgment in *Toy v Musgrove.*[28] As will be identified more clearly later in this chapter, Alfred Deakin and Henry Wrixon QC, both of Victoria, brought *Toy v Musgrove* to the delegates' attention on several occasions, with the effect of using the competing reasons of the six justices of the Supreme Court of Victoria as a plea to ensure that the constitutional text being drafted at that Convention addressed the jurisprudential issues at the centre of *Toy v Musgrove*. Reference to *Toy v Musgrove* in the Convention Debates has received some academic attention,[29] and was discussed in *Ruddock v Vadarlis*[30] (the *Tampa case*). To date, the High Court has not made any connexion between the reasoning in *Toy v Musgrove*, and the operation of either the executive power of the Commonwealth, or the prerogatives of the Crown in right of the Commonwealth.

IV HENRY WRIXON QC

It is not the purpose of this work to outline the political, economic and social pressures that gave rise to the Federation movement or the Conventions, or conferences which led to Federation. That task has been adequately undertaken by others.[31] Rather, central to this author's contentions is the necessity to identify those portions of the Convention Debates that touch upon the nature and scope of the executive power of the Commonwealth, as well as the recognition of the prerogative of the Crown in the text of the Constitution.

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28 (1888) 14 VR 349.

29 J Waugh, "*Chung Teong Toy v Musgrove* and the Commonwealth Executive" (1991) 2 *Public Law Review* 160-178.

30 [2001] FCA 1329 (consisting of Black CJ, Beaumont and French JJ).

31 See generally, J Quick, R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 79; J A La Nauze, *The Making of the Australian Constitution*, 1; R S French, "The Constitution and the People", R French, G Lindell & C Saunders (editors), *Reflections on the Australian Constitution*, 60, 64.

Nor is it the purpose of this work to identify the contribution of the various members of the dramatis personæ. That said, so consequential to the story is one delegate that special mention ought to be made of him.

Henry Wrixon (1839-1913) was a Victorian delegate to the First Convention. Wrixon was a member of the Victorian Legislative Council. He was called to the Irish Bar (the land of his birth) in 1861, but returned to Victoria in 1863. He was solicitor-general in the McColloch ministry in 1870, and held that office for twelve months. He was appointed Attorney-General in the Gillies-Deakin ministry in 1886; an office he held until just prior to the commencement of the First Convention in March 1891. He was appointed as one of her Majesty's Counsel in 1890. Significantly, as the first law officer of the Crown, Wrixon appeared in 1888 for the colony in the politically-charged case of *Toy v Musgrove*[32] before six justices at the Supreme Court of Victoria. The Supreme Court found for Ah Toy and Wrixon departed for London to appear (as junior counsel) for the colony in the appeal of the Supreme Court's decision to the Judicial Committee of the Privy Council. The Board heard the appeal on 13, 14 and 19 November 1890 (with judgment delivered on 18 March 1891),[33] and Wrixon was delayed in returning to the Australian colonies. He was absent from the commencement of the First Convention on 2 March 1891, until 9 March 1891. Wrixon was widely acclaimed for "his thoughtful and scholarly exposition of constitutional principles" at the First Convention.[34]

Wrixon failed to get elected to the second Convention, and his only legacy in the drafting of the Federation Bill comes from the participation in the First Convention.[35]

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32 (1888) 14 VLR 349.

33 *Musgrove v Chun Teeong Toy* (1891) AC 272.

34 A Deakin, *The Federal Story: The Inner History of the Federal Cause*, 36.

35 Wrixon was subsequently the President of the Legislative Council of Victoria (1901-1910), and was the Vice-Chancellor of the University of Melbourne from 1897-1910.

V THE NATIONAL AUSTRALASIAN CONVENTION, 1891

The most important contribution to the recognition of the prerogatives of the Crown into the constitutional text was at the First Convention, officially known as the National Australasian Convention, which was convened in Sydney from 2 March 1891 until 9 April 1891.

5 March 1891

On Monday, 5 March 1891, in the early stages of the Convention and after lengthy consideration of the role of the upper house in a new Commonwealth Parliament, Alfred Deakin addressed the Convention to draw the delegates' attention to an issue that has recently impacted upon his own colony. Mr Deakin told delegates that "in drawing the constitution proposed to be adopted by federated Australasia" they "may not shape it without regard to recent interpretations of colonial constitutional rights" which are "to be found in the judgment in the case of Ah Toy *versus* Musgrove, delivered by the Supreme Court of Victoria".[36] Deakin told delegates that in that case "the powers of the Executive and those conferred upon the colony under the Constitution"[37] were the subject of a challenge in the Supreme Court and the Judicial Committee of the Privy Council. Deakin said that the Court's and the Board's findings "will demand the most careful consideration when the federal constitution is being framed, because it has been the common belief in Victoria that we had all the powers and privileges attaching to responsible government, sufficient to enable us to perform all the duties and to exercise all the rights devolving upon us as a people".[38] Deakin observed that the "gravest doubt" is now thrown upon that belief. In telling delegates about *Toy v Musgrove* he praises then Chief Justice of Victoria, George Higinbotham, describing his judgment as one of a lawyer, orator and statesman.

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36 *Con. Deb. Syd, 1891*, 84.

37 *Con. Deb. Syd, 1891*, 84.

38 *Con. Deb. Syd, 1891*, 85.

Deakin quoted from the judgment of Higinbotham CJ when the Chief Justice said that: "It was the intention of the Legislative Council to provide a complete system of responsible government in and for Victoria, and that intention was carried into full legislative effect with the knowledge and approval and at the instance of the Imperial Government by the "Constitution Statute", passed by the Imperial Parliament".[39] He also quoted from the judgment of Kerford J (who was, like Higinbotham CJ, a sometime Attorney-General of the colony of Victoria). Mr Justice Kerferd was quoted as saying: "All the prerogatives necessary for the safety and protection of the people, the administration of the law, and the conduct of public affairs in and for Victoria, under our system of responsible government, have passed as an incident to the grant of self-government (without which the grant itself would be of no effect) and may be exercised by the representative of the Crown in the advice of responsible ministers".[40]

Alfred Deakin told delegates that those two views expressed by the minority in *Toy v Musgrove* "embody the belief which was held until lately in Victoria".[41] He then told delegates what the majority held; first quoting from Sir Hartley Williams: "I have been for years in common with, I believe, very many others, under the delusion (as I must term it) that we enjoyed in this colony responsible government in the proper sense of the term. I awake to find, as far as my opinion goes, that we have merely an instalment of responsible government".[42] Deakin pointed out to delegates that Holroyd J considered that "we have only a measure of self-government",[43] and that a' Beckett and Wrenfordsley JJ concurred.

After praising his fellow, but absent, Victorian delegate, Henry Wrixon QC[44] (who was at that stage yet to arrive in Sydney for the Convention), for arguing *Musgrove v Toy* with

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39 *Con. Deb. Syd, 1891*, 85.
40 *Con. Deb. Syd, 1891*, 85.
41 *Con. Deb. Syd, 1891*, 85.
42 *Con. Deb. Syd, 1891*, 85.
43 *Con. Deb. Syd, 1891*, 85.
44 And until recently, the Attorney-General of the Colony of Victoria.

great force and ability before the Privy Council, the Chief Secretary expressed his view that:[45]

> The governor-general, as representative of the Queen in these federated colonies, should be clothed by statute with all the powers which should belong to the representative of her Majesty; he should be above all risk of attack, because he should act only on the advice of responsible ministers …

In gently guiding delegates from the concept of responsible government to the devolution or investment aspect, Deakin told delegates that in framing a federal constitution "we should set out with the explicit claim to possess and exercise all the rights and privileges of citizens of the British empire to the same extent that they are possessed and exercised by our fellow-countrymen in Great Britain itself".[46]

"Australia", Deakin said "is entitled to absolute enfranchisement".[47] Recognising the complexity of what is meant by the convention of responsible government, Deakin observed that "[w]e are dealing with a constitution which has not yet reached the full period of its growth, which always has been and always will be steadily progressive, expansive, and adaptable to national growth".[48]

There can be no doubt that Alfred Deakin was an eloquent and persuasive orator. And the delegates present can reasonably be presumed to have felt the force of Deakin's plea; but in his eloquence, Deakin injected complexity into the framing of the Constitution. His gentle hewing back and forth between how to establish the British cabinet system of government, and to ensuring the governor-general was "clothed by statute with all the powers which should belong to the representative of her Majesty", served to obscure the

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45 *Con. Deb. Syd, 1891*, 85 (Deakin).
46 *Con. Deb. Syd, 1891*, 86.
47 *Con. Deb. Syd, 1891*, 86.
48 *Con. Deb. Syd, 1891*, 86.

attention of the framers from the textual recognition or affirmation that may be prudent to ensure that the prerogatives of the Crown are vested and exercised according to the delegates' intentions.

After some further rhetorical flourish, Deakin offered a prayer that "I trust I have not been misunderstood".[49] The just-mentioned contribution to the debate constituted the only express reference to the prerogatives of the Crown prior to the drafting of the first draft of the Federation Bill for the consideration of the Convention.

1 April 1891

On 1 April 1891, the Constitutional Committee (the drafting committee) reported to the Convention. The Convention, constituted as the Committee of the Whole, began its herculean task of considering the draft Commonwealth Bill clause-by-clause, beginning with chapter 1 "The Legislature".

At the commencement, the recently arrived Victorian delegate Henry Wrixon QC opened the discussion at the start of the consideration of the bill in committee. Wrixon flagged his concerns with two aspects of the draft Bill. Relevantly, Wrixon began his second criticism by identifying the devolution or investment aspect. He said:[50]

> …. There is a portion of this bill establishing constitutional government, and I think it was truly said yesterday that the effect of that portion would be to establish in this federation in its ordinary working responsible government. But the form in which ministers are to be appointed, I think, wants a little consideration, because it involves a very serious point. In clause 4 of chapter II, page 13, it is provided:

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49 *Con. Deb. Syd, 1891*, 86.

50 *Con. Deb. Syd, 1891*, 86

> For the administration of the executive government of the commonwealth, the governor-general may, from time to time, appoint officers to administer such departments of state of the commonwealth as the governor-general in Council may from time to time establish, and such officers shall hold office during the pleasure of the governor-general, and shall be capable of being chosen and of sitting as members of either house of the parliament.

> Now, the point I wish to draw attention to is that I do not think the provision will convey to those officers thus appointed by the governor the great power and authority which, under the English system of government, belongs to a responsible minister of the Crown. That is something distinct from the position of an officer appointed to administer a department.

Wrixon reminded the Convention of *Buron v Denman*,[51] and at this point Inglis Clark interjected: "Read the last line. The clause provides that the officers shall be members of the federal executive council!",[52] to which Wrixon responded "It does not connect them with the Sovereign".[53] Inglis Clark then compared what is proposed with Canada, and Wrixon pointed out that in Canada the ministers are members of the Queen's Privy Council. Inglis Clark was unpersuaded. Wrixon pressed the point:[54]

> … the question has never been raised in Canada; but I think the question certainly would be raised here; and, according to my view, I think there can be little doubt but that the courts would hold that ministers so appointed did not inherit all the great powers of the Queen's ministers, and which powers are yet

51 2 Ex. 167 (1848).
52 *Con. Deb. Syd, 1891*, 540.
53 *Con. Deb. Syd, 1891*, 540.
54 *Con. Deb. Syd, 1891*, 540.

> necessary for the carrying on of the government. If a few words will meet this point, I think it is most important that it should be met.

Wrixon then changed the topic to the question of appeals to the Queen in Council. During the course of the in-committee consideration of the draft bill, Griffith proposed a small amendment to the draft clause that became s 2 of the Constitution. He proposed that the words "her Majesty's" be omitted with the view of inserting the words "the Queen's".[55] The amendment was agreed to without debate.

Then, Richard Chaffey Baker moved that after the word "functions," in the same clause, the following words be inserted "as are contained in schedule B hereto, and such other powers and functions not inconsistent there-with".[56] Baker's purpose was to ensure that "[i]t will be seen that we are deliberately making the instructions given to her Majesty's representative part of our Constitution."[57] Clark, Griffith and Deakin contributed to the debate on the proposed amendment, with Deakin asking what those enumerated powers would be. Baker replied:[58]

> Well, I am not prepared to put in the whole of the powers and functions which are to be expressly set forth as having to be performed by the Governor; but I want to affirm the proposition that they shall be, as far as possible, contained in our constitution. … Among other things I will mention one matter which, I think, certainly ought to be inserted in the schedule of this bill, and that is as to the manner in which the governor-general is to exercise the prerogative of pardon.

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55 *Con. Deb. Syd, 1891*, 574.
56 *Con. Deb. Syd, 1891*, 574.
57 *Con. Deb. Syd, 1891*, 574.
58 *Con. Deb. Syd, 1891*, 574.

Baker went on to point out the manner in which the prerogative of mercy is devolved or invested (and therefore exercised) in Canada. Baker told the other delegates that the governor-general of Canada "acts in matters relating to the interests of the empire as an officer of the Imperial Government; but in all other cases it is expressly laid down that he is to act on the advice of his responsible ministers".[59] Baker told the delegates that:[60]

> I should like to see in the schedule to this bill all the powers and functions of the governor-general [of Australia] which it is possible to define and to reduce to writing, so defined. I do not wish that we should have to go to Downing-street from time to time to find out what the powers of our constitution are.

At this point Deakin contributed to the debate. In respect of Baker's proposed schedule of powers, Deakin told the delegates that the "first question" which needs to be considered was:[61]

> … whether this is the best means of accomplishing, the end which the hon. member has in his mind. If the hon. member proposes to define the powers of the governor-general so far as they can be defined, I am cordially with him. The matter, indeed, received some attention at the hands of the committee, though the question as to the method of definition to be adopted was felt to be surrounded with difficulty. The solution which I wish to suggest to the hon. member who has now moved his amendment is that it would be better to embody in the bill itself anything that we have to say on this subject; and for my own part, I cannot conceive that it will be necessary to do anything more-if I may repeat what I was urging a few minutes ago in connection with another

59 *Con. Deb. Syd, 1891*, 575.
60 *Con. Deb. Syd, 1891*, 575.
61 *Con. Deb. Syd, 1891*, 575.

> subject-than to insert in this bill, and to state on the very face of the constitution, that the governor shall invariably act on the advice of his responsible ministers, that every act of his shall be countersigned by a responsible minister who shall make himself responsible by his signature for that particular act. That will apply even to circumstances under which a governor-general changes his ministers.

After some further debate by Griffith, Deakin and Playford, Deakin attempted to satisfy Baker's concerns by suggesting that:[62]

> … we can easily embody it in language; and I would suggest to the hon. member, Mr. Baker, that it would meet all the purposes of the schedule which he proposes, and do away with what seems to be an indirect method of dealing with the matter, to say directly that the governor's powers shall be limited by the necessity on his part of obtaining the signature of a responsible minister to every one of his acts.

At this point, and in the context of considering clause 2 in detail, Wrixon drew together the threads of the devolution and investment aspect of the debate, and pointed the delegates towards achieving the constitutional purpose in the draft chapter that sets out the executive government. Wrixon said:[63]

> It seems to me, sir, that if we take care, when we come to the portion of the bill dealing with the executive government, to thoroughly establish responsible government, we may let this clause go as it is, because whatever functions are vested in the governor-general will then necessarily come under the operation of responsible government, and we need do nothing further. It is just like the case

62 *Con. Deb. Syd, 1891*, 575.
63 *Con. Deb. Syd, 1891*, 575-6.

> of the Sovereign herself. She has vast prerogatives, great powers but however vast or great they are does not signify to the people of England so long as there is responsible government established. Therefore, instead of seeking to limit the powers which the Sovereign may depute to the governor-general, or to schedule the acts which he may or may not do, we have to take care to thoroughly establish responsible government, and, if we do that, the rest will take care of itself.

After a small quip by Dr Cockburn, Wrixon went on to say: "You want no definition or enumeration of the powers. All you have to take care is that you thoroughly establish responsible government, and I think that a few words ought to be added to the bill when we come to that portion".[64] Rather bluntly, this topic of debate then ceases, and the Convention's delegates proceed to consider other matters.

Through this discrete portion of the Convention's deliberations, and through the delegates' initial consideration as to of how the prerogative was to be devolved or invested in the executive government of the Commonwealth, light is thrown upon the recognition or affirmation aspect. Baker's proposal to attach a schedule to the Constitution which sets out the Governor-General's powers and functions is premised upon the idea that the prerogative is to tacitly continue to operate in respect of the Commonwealth, and the that there is virtue (so he thought) in expressly setting out what those powers and functions are. This portion of the debate throws light upon the devolution and investment aspect, as well as the recognition and affirmation aspect.

6 April 1891

A further five days went by in which the Convention considered draft Chapter I. On Tuesday 6 April 1891, the Convention resumed consideration of the proposed Chapter II, to be entitled "The Executive Government". The Convention proceeded to consider draft cl

64 *Con. Deb. Syd, 1891*, 576.

4 of the drafting committee's recommended provisions. It is important to note that the Convention at this point in time made no reference to cl 1 of Chapter II - the clause which included the expression, "executive power and authority of the Commonwealth", and the clause that would, in addition to draft cl 6 of Chapter II go on to eventually be enacted as s 61 in the Constitution. Draft cl 4 read:

> For the administration of the executive government of the commonwealth, the governor-general may, from time to time, appoint officers to administer such departments of state of the commonwealth as the governor-general in council may from time to time establish, and such officers shall hold office during the pleasure of the governor-general, and shall be capable of being chosen and of sitting as members of either house of the parliament.
>
> Such officers shall be members of the federal executive council.

Henry Wrixon returned the debate to the issue raised by Alfred Deakin the previous day. What followed was a nuanced and sophisticated debate about the relationship between the principle of responsible government, and the powers vested in the ministers and the ministry to exercise the common law recognised attributes of the Crown, as the Queen's ministers in England do – that is, about the devolution and investment aspect of the relationship.

Henry Wrixon had a nuanced understanding of the issue of whether the Crown's Victorian ministers were vested with the full prerogatives enjoyed by the Crown in the United Kingdom. As identified *supra*, as the Attorney-General of Victoria, Wrixon was counsel in *Toy v Musgrove* (referred to in the Convention Debates the day earlier by Deakin) when the matter was heard by the Full Court of the Supreme Court of Victoria.[65]

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65 *Toy v Musgrove* (1888) 14 VLR 349 (Higinbotham CJ, Williams, Holroyd, Kerferd, a'Beckett and Wrenfordsley JJ)

Furthermore, Wrixon had been counsel for the appellant Musgrove (who was the Collector of Customs) when the matter was heard by the Judicial Committee of the Privy Council only four months prior to the Convention in November 1890.[66] It was Wrixon who made the appellant's oral submissions to the Privy Council on the question of whether Victorian ministers were invested with the necessary power to eject an alien from the colony.[67] Wrixon had a very detailed and nuanced understanding of the issue he was raising with his fellow Convention delegates.

Wrixon began the debate on the text of clause 4, which was ultimately to end up as section 64 of the Constitution:[68]

> [Clause 4] may be said to constitute responsible government in the dominion. It provides that the governor-general may appoint officers to administer departments of state, and it declares that such officers shall be members of the federal executive council. I have no doubt that the effect and operation of that will be to constitute a system of responsible government in the dominion; but the question which I think requires some consideration, and some slight addition to the clause, is whether it will clothe them with all the vast constitutional powers which, under the system of the English government, belong to responsible ministers of the Crown. I myself do not believe that it will. The greatness of these powers, and how vast is the authority which any responsible minister of the Crown exercises in binding the Crown and the Sovereign, is well known, of course, to all my legal friends, and was well illustrated in the old case which I mentioned to the Convention before, namely, the case of *Buron and Denman*. The Supreme Court of Victoria has held that similar words in our Constitution Act do not carry with them any such implied authority to the minister who holds

66 *Toy v Musgrove* [1891] AC 272.
67 [1891] AC 272, 278.
68 *Con. Deb. Syd, 1891*, 766.

> any such office, on the ground that the statute that created the office and defined his duties is not held to carry with it the larger powers to which I have adverted.

Griffith and Downer then made the point that there are no words in the Victorian Constitution Act which are "like that", "[n]or in any constitution!"[69] Inglis Clark opined that Wrixon's objective is met by the words "such officers shall be members of the executive council". Wrixon disagreed, and said:[70]

> … In my opinion it is not; but it is a matter for consideration; and, whatever opinion may be taken of it, I myself think that the matter should be put beyond doubt; for, unquestionably, in carrying out responsible, every-day government, it is highly important that the ministers of the Crown here should, in regard to all Australian matters, be invested with exactly the same presumptions of authority and ratification from the Crown as apply to the English ministers with regard to all English matters.

In reading the *Official Report* of the First Convention, it can be seen that the matter raised by Wrixon underwent a refinement during the in-committee stage. The debate commenced with the delegates considering how to achieve responsible government, without actually using the words "responsible government". The debate then sharpened; and the devolution and investment aspect began to become the focus of the debate. In a lengthy and important contribution, Alfred Deakin said that "… it is not our desire that ministers under the commonwealth shall be in the same position as ministers under colonial constitutions. If there is a doubt as to the authority of a state minister, there should be no doubt as to the authority of a minister under this constitution".[71] Speaking directly to the recognition and

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69 *Con. Deb. Syd, 1891*, 766.
70 *Con. Deb. Syd, 1891*, 766-7.
71 *Con. Deb. Syd, 1891*, 769-70.

affirmation aspect, Deakin continued: "… the power of the Crown itself is nowhere defined, and cannot be defined under this constitution. It is vast and vague; but all the power which the Crown exercises ministers must be able to exercise when the need arises …".[72] Returning to the devolution and investment aspect he then called upon Griffith to suggest some words that would cure that defect: "Let him use any form of words he pleases which will convey to the ministers of the commonwealth the same power of acting with that vast and vague authority, under any and every circumstance, which is possessed by ministers of the Crown in Great Britain".[73] Deakin concluded by asking why the framers should not put in the clause a phrase which conveys "without a scintilla of doubt" to the future ministers of the Commonwealth all the powers which are possessed by ministers of the Crown in Great Britain?

Deakin's contribution to the debate is important and consequential. It sharply identified the mischief that was sought to be remedied by the addition of a set of words. After Deakin, Griffith made an important concession. He acknowledged that until that point in time, he had not appreciated with clarity the nature of the argument being made by Wrixon and Deakin, and therefore did not appreciate the need for amending the text of the clause to take account of the Victorian delegates' concerns. This throws light upon Griffith's earlier statement that "we define the extent of the executive power which they are to administer",[74] and suggests that by "executive power" he had not yet achieved clarity. Griffith acknowledged:[75]

> I am trying to get at the ideas which are underlying the argument of hon. gentlemen. I confess I have not got at them yet. The hon. member, Mr. Deakin, talks about the powers exercised by the ministers of the Crown in Great Britain.

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72 *Con. Deb. Syd, 1891*, 769-70.
73 *Con. Deb. Syd, 1891*, 769-70
74 *Con. Deb. Syd, 1891*, 767.
75 *Con. Deb. Syd, 1891*, 770.

> They do not differ in any respect from the powers exercised by ministers of the Crown in any other country.

Dr Cockburn made the obvious point: "They are much superior to the powers of ministers here". Deakin concurred: "The powers of our ministers are limited, and theirs are unlimited".[76]

At this point the debate crystallised into one about the nature and source of the Crown's powers – a debate about the recognition or affirmation of the prerogatives, as well as their devolution upon and investment in the executive government of the Commonwealth. Griffith staked out his position as to the meaning of the text, and his understanding of what powers were to be vested in the Queen by use of the term "ministers" and the prerogatives of the Crown which he believed flowed automatically from the existing text. Griffith asked:[77]

> What is the power to be exercised? The sovereign power of the state. The head of the state, being one person, cannot do everything himself. He, therefore, has ministers, servants nominally of himself, but really of the people, to do that work for him. They are called ministers, but it is the power of the head of the state which is being exercised all the time. What more words can you use for the purpose of saying that? He shall appoint proper officers to do it.

He continued:[78]

> The power is vested in the Queen. For the administration of that power, officers shall be appointed. What more can you say? Can you go on and say that when

76 *Con. Deb. Syd, 1891*, 770.
77 *Con. Deb. Syd, 1891*, 770.
78 *Con. Deb. Syd, 1891*, 770-1.

> they are appointed they shall have power to do their duty, or say that they shall exercise such functions as are usually exercised by officers of state? It is all reasoning in a circle. The officers of state will exercise the functions of officers of state, and the officers of state are the same in England as anywhere else. The more you reason about the matter, the more you will find yourself getting into a circle, and coming back to your starting point. What additional power is there? If the hon. member will point out any power which can be exercised by the sovereign authority which is not expressed by the words, I shall not only be willing, but anxious to supply the defect. But I cannot see the defect he is pointing to. He assumes that English ministers have peculiar and extra powers. I should like to know what they are? They exercise the prerogative powers, of course, and the hon. gentleman, I think, has confused the argument used in Victoria as to whether colonial ministers have power to exercise the prerogatives of the Queen with the question whether they have power to exercise the functions conferred upon them by the constitution. The argument in the Victorian court was whether a certain royal prerogative could be exercised by a colonial government. We cannot propose by a sweeping provision to say that all the royal prerogatives shall be exercised by the governor-general-in-council. That seems to me to be the nearest to what the hon. member is driving at. If that is what he means, then it is a question for fair consideration whether we ought to put such-a provision in the bill. But nothing short of that will cover all that he has been arguing for.

Deakin pointed out that in *Toy v Musgrove*:[79]

> … the Supreme Court [noted] that the words "responsible minister of the

79 *Con. Deb. Syd, 1891*, 771.

> Crown" appeared in certain statutes passed by the Victorian Parliament since the passing of the Constitution; but that they did not appear in the [Victorian] Constitution Act …

Deakin then said that if those words had been inserted there, they "would have made a very great difference" in the way in which the Supreme Court would have regarded ministerial authority in Victoria.[80] Somewhat embarrassingly, Griffith then incorrectly said that the Privy Council said that was wrong.[81] He was corrected by Deakin:[82]

> As far as I am acquainted with their judgment, the Privy Council did not enter upon that particular issue at all. They have not even considered the point, to say nothing of giving an opinion upon it. The judgment, therefore, remains for what it is worth as a judgment of the Supreme Court. If the words my hon. colleague desires to introduce had been inserted in the Victorian Constitution Act, the ministers of Victoria would have had greater power than they now possess. The words the hon. gentleman has just suggested, conveying sovereign power to ministers, would be amply sufficient. Those words should be embodied in this constitution.

Griffith finished Deakin's statement: "That is to say, that all the royal prerogatives should be exercised by the governor-in-council". Deakin accepted that, but added:[83]

> Exercised by him through his ministers. Unless that claim be put forward in our constitution, we shall have taken and be taken to have accepted something less,

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80 *Con. Deb. Syd, 1891*, 771.
81 *Con. Deb. Syd, 1891*, 771.
82 *Con. Deb. Syd, 1891*, 771.
83 *Con. Deb. Syd, 1891*, 771.

> and we shall be always liable to be challenged with having exceeded the authority of the Constitution with which her Majesty has been pleased to endow us. Why should we leave the matter open to doubt? Why should we leave the ministers of the commonwealth liable to be challenged in the exercise of their duties to the people they represent? Why should we not now put forward the claim of ministers of the commonwealth to act for her Majesty and for the people of the commonwealth as if they were her Majesty's imperial ministers, excepting, of course, in cases where imperial interests are concerned, which would necessarily attach to the British Government and the Imperial Parliament?

Importantly, Deakin at this point ceded an aspect of the argument. He acknowledged that the prerogatives of the Crown can be split into those rights and powers which could and should be exercised by the proposed Commonwealth ministers, and there were prerogatives which could only (at that stage) be exercised by the Imperial ministers, for Imperial interests. At that point, Victorian delegate, Nicholas Fitzgerald, asked Griffith whether, in his opinion, the effect of the insertion of these words would be to enlarge the scope of the duties or prerogatives of responsible ministers.[84] Sir Samuel responded:[85]

> In my opinion, they would not; and I think, at the same time, that they are extraordinary words to put in an act of parliament. No other words I know of would cover that for which the hon. member is asking; and it is rather a singular thing to ask the Imperial Parliament to do for Australia a thing which it has never done for itself.

The Vice President of the Convention (Griffith) continued:[86]

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84 *Con. Deb. Syd, 1891*, 771.

85 *Con. Deb. Syd, 1891*, 771.

86 *Con. Deb. Syd, 1891*, 772 (Griffith).

> To ask the Crown in one short sentence to surrender, in respect to Australia, all its prerogatives is rather an extraordinary thing to do. At this moment I believe no one knows what they all are. No one could at once enumerate them all; and hon. members may rely upon this, that the enumeration would be carefully gone through, and that if there were one prerogative concerning which there was the slightest doubt-that is, with regard to its inclusion-parliament would not pass it, and it would be quite right, too. We might ask for it; but would it not be a pity to lose the constitution because one point could not be granted? For instance, one of the royal prerogatives is to declare war. What about that?

The debate sharpened further, and the delegates focused upon the scope of the prerogative powers they proposed to convey to the Commonwealth ministers. Additionally, they were conscious of frightening the Imperial Government with language that might lead Whitehall to think that it was losing prerogative powers to oversee Imperial interests. Deakin told delegates that they could "make an exception in favour of imperial interests"; making clear that "[w]e have no desire to interfere with the imperial prerogative in matters of war and peace".[87]

The debate shifted to the issue of where was the proper place in the Constitution Bill to add words which make it clear that the prerogatives of the Crown were devolved or invested in the Commonwealth ministry. Griffith asked the Convention if the proper place was in the enacting part of the bill. Deakin said no, and said that the proper place is when the draftsmen were "dealing with the executive government". Connecting the powers to the governor-general, Deakin said that "the governor-general" should have "power for everything", and then delegate it.[88]

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87 *Con. Deb. Syd, 1891*, 772.

88 *Con. Deb. Syd, 1891*, 772.

Griffith then appeared to revert to his earlier view. He cautioned that the addition of the words would amount to a surrender by the Queen, and should be in the enacting part of the bill. He appealed to delegates:[89]

> … I would ask hon. members to pause before they determine upon asking the Queen to surrender all her prerogatives in Australia. For my part, I believe that all the prerogatives of the Crown exist in the governor-general as far as they relate to Australia. I never entertained any doubt upon the subject at all-that is so far as they can be exercised in the commonwealth. Certainly the putting in of such a phrase as has been suggested ought not to done without very grave consideration.

Contemporary readers of the Convention Debates might conclude that Griffith, whilst believing that the text he had drafted sufficiently empowers Commonwealth ministers with the prerogative, nevertheless is concerned about the location and desirability of expressing the principle. In an effort to find a way forward, Queensland delegate, Andrew Thynne, sought to achieve Deakin and Wrixon's objective, whilst also addressing Griffith's concerns about Imperial interests:[90]

> I think the two contending parties might be reconciled without any material addition to the clause, but with only a slight re-arrangement of it. I would ask the hon. member, Sir Samuel Griffith, to follow me while I read the clause as I propose to leave it:
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> > The governor-general may, from time to time, appoint such officers as may be necessary for the administration of the executive government of the

89 *Con. Deb. Syd, 1891*, 772.
90 *Con. Deb. Syd, 1891*, 772.

> commonwealth. Such officers shall hold office during the pleasure of the governor-general, and shall be capable of being chosen and sitting as members of either house of parliament. Such officers shall be members of the federal executive council, and shall administer such departments of state of the commonwealth as the governor-general-in-council may from time to time establish.

After Sir Thomas McIlwraith made a contribution,[91] Deakin responded to Griffith, saying that Griffith's real objection is to the phrase "responsible minister of the Crown", and that:[92]

> … The hon. member says it is an "epithet," but nevertheless it points in two very valuable directions. It points, in the first instance, to the exercise by ministers of all powers in the Crown, and, in the second instance, to the responsibility of those ministers to parliament for every action they take in their ministerial capacity. In both of these respects the phrase, although it may be called an epithet, is an extremely valuable one. Why not meet the case by striking out the word "officers," and make the clause read:
>
> > The governor-general may from time to time appoint responsible ministers of the Crown.

Deakin demonstrated a clear appreciation of the dual application of the phrase "responsible ministers" – it is a source of power, as well as a statement of political operation. Now, the President of the Convention, Sir Henry Parkes, stirred: "The hon. member would not find

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91 *Con. Deb. Syd, 1891*, 772.

92 *Con. Deb. Syd, 1891*, 772-3.

such a phrase in any English law!"[93] Mixing the recognition and devolution aspects, Deakin argued:[94]

> We do not desire to introduce words which might seem to claim for Australia royal prerogatives; but we do wish to introduce words claiming all the prerogatives of the Crown directly relating to Australia. What we say is that these clauses, as they stand, do not with sufficient distinctness make that claim, and that we should seize every opportunity of placing points of this importance beyond all dispute, that we should embody, in these clauses the claim of ministers of the commonwealth to exercise all the prerogatives of the Crown which may be necessary in the interests of the commonwealth. I would ask the hon. member, Sir Samuel Griffith, to himself suggest a phrase, and in default of that to accept my hon. colleague's amendment. I would suggest words claiming that as regards the interests of the commonwealth, ministers of the Crown here should have the same powers as have ministers of the Crown in Great Britain, distinguishing Great Britain of course from the empire at large.

With precision, Deakin has brought the debate to the key issue – that of investing the Commonwealth ministers with the power to exercise all the prerogatives of the Crown which were appropriate for the newly established Commonwealth, and does not offend against Imperial interests. Acknowledging that the framers did not seek to usurp the Imperial prerogatives, Deakin said in respect of the Commonwealth's power:[95]

> … all the limits that we want of that absolute power in the commonwealth is, so far as it relates to the commonwealth, to exclude all prerogatives relating to the

93 *Con. Deb. Syd, 1891*, 773 (Parkes).
94 *Con. Deb. Syd, 1891*, 773.
95 *Con. Deb. Syd, 1891*, 773.

> empire outside the commonwealth. There is no pretence to claiming the power of proclaiming peace or war, or of exercising power outside our own boundaries; but let us have it stated plainly in the constitution that the officers here, called heads of departments, shall be absolutely ministers of the Crown. We know what that means.

Sir Henry Parkes disagreed; "That is exactly what we do not know!"[96] Deakin acknowledged that "we do not know what the royal prerogative is. We have not exhausted its meaning", and therefore argued that it would "be better to carry out the principle" by expressing it through "the most explicit, indisputable, unmistakable claim to this power".[97]

Sir John Bray expressed the view that Parkes' suggestion will not achieve that aim. Deakin said that "[b]y calling these officers responsible ministers of the Crown, they will be empowered to meet all unanticipated contingencies". Griffith disagreed; "The words do not convey" that meaning. Drawing the Convention's focus back to the decision of *Toy v Musgrove*, Deakin responded:[98]

> They did to the Supreme Court of Victoria. We had a number of judges stating that if these words were contained in the Constitution Act of Victoria they would adopt a different attitude, and hold that ministers had greater power than they now have, those words ["responsible ministers of the Crown"] not being in our Constitution Act. Why not employ those words in this constitution, and place our meaning beyond doubt?

Sir Samuel then asserted some basal constitutional principles:[99]

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96 *Con. Deb. Syd, 1891*, 773.
97 *Con. Deb. Syd, 1891*, 773-4.
98 *Con. Deb. Syd, 1891*, 774.
99 *Con. Deb. Syd, 1891*, 774.

> It is difficult to know what is our meaning which it is desired to put beyond doubt. I agree that in this bill our meaning should be placed beyond doubt, but we must first find out what is our meaning. The hon. member uses the word "responsible," which simply means this: that ministers take the brunt of the advice which they give in the exercise of sovereign power of any kind. That does not give them any additional power. The word "responsible" only means in that case that the ministers take the blame. It is not a question of giving authority, it is a question as to who is to be punished for the improper exercise of authority. The word "ministers" means no more than "officers of state." It is only another epithet. Ministers of the Crown means officers of the Crown where there is a Crown.

Deakin had a different view; he said "[t]he words mean something more than that!" Griffith then expressed some frustration, saying "[t]he argument is becoming so refined that it is impossible to distinguish the differences". One eminent historian observed that "Griffith had trouble seeing the point, although he said he was trying".[100] Griffith went on to say:[101]

> Clause 4 says that for the administration of the executive government there shall be officers to administer such departments of state as the governor may prescribe, and he is to act on their advice. These are expressions that have been used so often that, they have become stereotyped; but I think the only authority for using in an act the words "responsible ministers of the Crown" is an error on the part of a draftsman in Victoria. It has not been followed by any of the other colonies. In some customs act somebody or other used the words "responsible

100 J Hirst, *The Sentimental Nation*, 31.

101 *Con. Deb. Syd, 1891*, 774.

> minister," and the Victorian judges thought that having been so used, there was something defective in the Constitution Act. I do not draw that inference; I think that the defect was in the subsequent act.

Hereupon, Wrixon tried to salvage his cause. He rejected the assertion that the words "responsible ministers" adequately achieved his constitutional objective that he set out at the start of the debate in response to the holding in *Toy v Musgrove*. "I am convinced that the Convention is making a serious mistake", he said. Wrixon called on Sir Samuel Griffith to suggest the necessary form of words in respect of the devolution and investment aspect, to ensure:[102]

> … that a minister in Australia shall have the same position with regard to the Crown in all matters Australian, as a minister in England has with regard to all matters English. We desire to have that object carried out. I am sorry the Convention does not attend to it, because I am sure we are making a mistake.

Wrixon's contribution, just recited, is a clear assertion that the object of the proposed amendments, as the mover intended, and as the Convention ought to have understood it, was to devolve and invest the Commonwealth ministers with all the powers of the prerogative that English ministers exercise in Great Britain. If there is any doubt, then South Australian delegate Sir Thomas Playford affirmed the point:[103]

> We are very much indebted to the hon. member, Mr. Wrixon, for calling attention to this matter. There is no hon. member who has had more practical experience, in view of recent events, of the necessity for making some provision of this kind. His attention has been drawn to the matter by the litigation which

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102 *Con. Deb. Syd, 1891*, 774-5.
103 *Con. Deb. Syd, 1891*, 775.

> has lately taken place on a very nice constitutional question. A decision was pronounced by some, at least, of the Victorian judges which forms the position for which the hon. member contends, namely, that it is necessary to make an amendment in the bill in order to give ministers of the Crown in Australia certain prerogative rights which are exercised by ministers in England for the benefit of the community.

Advocating against the use of the term "responsible" because it might perpetuate the system of responsible government, Sir Thomas nevertheless acknowledged that:[104]

> … we should at least profit by the experience of past years in order to clothe the officers of the commonwealth with all the powers which may happen to be necessary for the preservation of the rights of the community.

Sir Thomas connects *Toy v Musgrove* to the debate, saying that "[w]e have the decision of some at least of the Victorian judges that the power is not possessed by Victorian ministers; but that if certain phraseology had been employed, they would possess the power". Playford then affirms: "We know what we wish to do. We desire to confer on the executive ministers the right to exercise this prerogative as far as the commonwealth is concerned …".[105]

Kingston then suggested an amendment to the constitutional text which sought to achieve Wrixon and Deakin's constitutional purpose – for interpretative reasons, Kingston's suggestion is important because it was either ignored, or rejected by the Convention's delegates. Kingston said:[106]

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104 *Con. Deb. Syd, 1891*, 775.
105 *Con. Deb. Syd, 1891*, 775
106 *Con. Deb. Syd, 1891*, 775-6.

> I hope the hon. member who has moved the amendment will leave out the word to which I have referred, and to which it seems that objection can fairly be taken. At the same time, I will promise him that I will do all I can to assist him in achieving the object which he has in view in a manner which will not be open to the objections which I have urged. It occurs to me that something of the sort might be done if we amended section 1 on page 17, which vests the executive power and authority of the commonwealth in the Queen, to be exercised by the governor-general. Possibly some words might be inserted to show that that executive power and authority which would be exercised by her Majesty's representative under the advice of a responsible ministry would extend to the exercise of the prerogative which it is now desired to confer; but at the same time I sympathise with the remark made by various hon. members that it is a very delicate question. We should look very closely at the way in which we make any amendment on the subject. The object in view is one which I am convinced we ought to strain every nerve to achieve, and I shall be glad, indeed, if the hon. member who moved the amendment can arrange with the hon. and learned member, Sir Samuel Griffith, for some satisfactory mode of effecting what I believe to be a purpose which will commend itself to all.

The "recent events" that Kingston referred to is the *Toy v Musgrove* decision. The section 1 on page 17 he referred to is the draft clause investing the "executive power and authority of the Commonwealth" in the Queen; the forerunner of the first half of s 61 of the Constitution.

Kingston suggested that clause 1 (that is, the clause which became section 61 in the Constitution), be amended to include in the executive power and authority of the Commonwealth the power to exercise the prerogative. By the framers declining to adopt this suggestion, at the very least, the Convention is implicitly accepting that the devolution

and investment aspect of the prerogative is not achieved through clause 1 (ultimately section 61 of the Constitution), as it was then drafted.

Finally, Griffith, the principal drafter of the constitutional text proposed a solution to the problem of expressing the Convention's desire to devolve to, and invest in, the Commonwealth ministers the prerogative, but at the same time, leave the Imperial powers undisturbed in the hands of the Imperial ministry. Griffith reflected:[107]

> I have been all along trying to meet my hon. friends for the purpose of removing any doubt. A form of words has occurred to me since I spoke last, which I believe would relieve the minds of hon. members, and does not appear open to any objection. I would propose to add to the clause the words "and shall be the Queen's ministers of state for the commonwealth." I would suggest that the hon. and learned member should withdraw his amendment.

Henry Wrixon acquiesced. Wrixon said that he would be happy to withdraw his amendment; telling delegates "… I think that the addition to the clause of the words suggested by the hon. and learned member will adequately carry out what I desire".[108]

Having satisfied delegates that the expression "and shall be the Queen's ministers of state for the commonwealth" vests in the Commonwealth ministers the prerogative in its totality, except those powers which should remain with the Imperial Government, Wrixon's amendment was, by leave of the Convention, withdrawn.[109] The *Official Report* of the Convention's Debates then recorded that the amendment, proposed by Sir Samuel Griffith: "That the words "and shall be the Queen's ministers of state for the commonwealth" be

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107 *Con. Deb. Syd, 1891*, 776.
108 *Con. Deb. Syd, 1891*, 776.
109 *Con. Deb. Syd, 1891*, 776.

added to the clause", was agreed to, and then the amended cl 4 was agreed to by the Convention.[110] And given that there was no division, we must assume unanimously.

The deliberative act of amending the draft text can be seen when Sir Samuel Griffith's *Successive Stages of the Constitution* is examined. Written in Sir Samuel's distinctive handwriting are the words "& Shall be the Queen's Ministers of State for the Cth" – notated on the right-hand side next to the draft clause 4 (the eventual s 64 of the Constitution).[111] Griffith has marked an "x" at the end of the typed text, "Such Officers shall be Members of the Federal Executive Council", to identify where the handwritten addition is to appear in the text.

It is reasonably clear that it was the collective intention of the delegates to the First Convention in Sydney that the inclusion of the words "and shall be the Queen's ministers of state for the Commonwealth" was meant to affirm that the principle of responsible government had been adopted in Australia, *and* that the new ministers of state appointed under section 64 would unquestionably have devolved to them the constitutional ability to exercise the royal prerogative as it was thought desirable by the framers at that point in time for the Commonwealth ministers to exercise.

All the principal speakers in the debate acknowledged as much. Henry Wrixon and Alfred Deakin, both being Victorians and aware of the detail of the *Toy v Musgrove* litigation, clearly evinced a nuanced understanding of the constitutional issues. Sir Samuel Griffith, whilst initially stating his belief that the document as drafted already embodied responsible government (and therefore, in his view, also empowering the Commonwealth ministers with all the powers of state) moved his position to accept a form of words which he said responded to the previous speakers' intention of giving Commonwealth ministers the royal prerogative. Griffith appeared to want to leave the scope of that prerogative vague so as to ensure that it does not encroach upon the exercise of the prerogative by Imperial

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110 *Con. Deb. Syd, 1891*, 776.

111 S W Griffith, "*Successive Stages of the Constitution*", printed within J Williams', *The Australian Constitution, A Documentary History*, 379.

ministers relating to Imperial interests. Griffith also wished to avoid using the expression "prerogative" (as suggested by Wrixon in his earlier amendment) so as to reduce difficulties in having the Constitution enacted by the Imperial Parliament.

Particularly noteworthy in the debate is the final contribution made by South Australian delegate, Thomas Playford, where he suggested that the intention of delegates to vest Commonwealth ministers with the royal prerogative may be achieved by amending clause 1 of the draft Executive Government sections – the "executive power and authority of the Commonwealth" provision that went on to become section 61 of the Constitution. Playford's suggestion was not taken anywhere by the Convention's delegates, and immediately after it was made, Griffith proposed the inclusion of the "Queen's ministers of state for the Commonwealth" line for clause 4 (subsequently section 64). It is clear that the framers did not intend to textually recognise or devolve the royal prerogative in section 61.

Whilst the delegates were not expressly debating the source of the prerogative, by debating how the prerogative would be devolved on, and invested in, the Commonwealth, and, by the label accorded to the Federal Ministers as the "Queen's Ministers of State", the delegates were considering in detail the second and third aspects – that is, the devolution and investment aspect, and the execution aspect of the prerogatives of the Crown. Basal to that debate was the underlying assumption that the prerogatives of the Crown inhere in the Sovereign, and needed to be devolved or invested in the Governor-General for execution, and, furthermore, some positive affirmation needed to be made to ensure that the Commonwealth ministers were the ministers responsible for advising the governor-general in respect of the exercise of those devolved prerogatives.

VI THE AUSTRALASIAN FEDERAL CONVENTION, 1897-98

The federation movement experienced highs and lows throughout the course of the 1890s. The Second Convention – the Australasian Federal Convention was held in three of the colonial capitals; Adelaide and Sydney in 1897, and in Melbourne in 1898. Each of the gatherings was described as a "session" of the Convention. The First Session was held in

Adelaide from 22 March 1897 to 5 May 1897. The Second Session was held in Sydney from 2 September 1897 to 24 September 1897. The Third Session was held in Melbourne from 20 January 1898 to 17 March 1898.

The delegates to the Second Convention were elected by their respective colonies;[112] and were not merely parliamentary appointees as the delegates to the First Convention were. As such, the delegates to the Second Convention were formally described as "representatives".

With the passage of time and vagaries of colonial politics, the composition of the Australasian Federal Convention differed in some important respects to the National Australasian Convention in 1891. Griffith was not a delegate to the Second Convention. Having retired from politics, Griffith was appointed as the third Chief Justice of Queensland in March 1893. Andrew Inglis Clark, who was again the Attorney-General of Tasmania, was absent in the United States at the time of the First Session in Adelaide, and he had left the ministry by the time of the Second Session in Sydney. He was appointed as a puisne justice of the Supreme Court of Tasmania in June 1898, and therefore, like Griffith, could not continue to play a public role in the federation movement. Henry Wrixon, by now Sir Henry, was no longer the Attorney-General of Victoria. He had left the lower house, and was, by the time of the Second Convention, a member of the Victorian Legislative Council. He stood for election as a Victorian delegate to the Australasian Federal Convention, but failed to be elected.

First Session, 14 April 1897

In the First Session in Adelaide on 14 April 1897, the Convention continued consideration of draft Chapter I, "The Legislature". Towards the end of the day, after rejecting Josiah Symon's suggestion to amend the name of the lower house of the Parliament from the

112 Although, the delegates from Western Australia were appointed; and Queensland did not send any delegates to the Australasian Federal Convention 1897-98.

House of Representatives to the House of Commons, the delegates moved to consider the drafting of clause 2 which at that point read:

> The Queen may, from time to time, appoint a Governor-General, who shall be Her Majesty's representative in the Commonwealth, and who shall have and may exercise in the Commonwealth during the Queen's pleasure, and subject to the provisions of this Constitution, such powers and functions of the Queen as Her Majesty may think fit to assign to him.

Patrick McMahon Glynn,[113] a South Australian delegate and a member of South Australia's House of Assembly, asked:[114]

> Does not this section go a little too far? It seems to me to be making active in the Governor-General a prerogative which is practically dormant or dead in the Queen. We know at present that there are many prerogatives of the Crown which if pushed into exercise might be particularly injurious to the State. For instance, there is the power of dismissing the navy and of disbanding the army, and these prerogatives are constitutionally dead, but if the Queen chooses to assign powers within the limits of this Act they become operative. I therefore move: To add to the end of the clause the words: "And capable of being constitutionally exercised as part of the prerogatives of the Crown."

Somewhat inexplicably, without any further debate, the amendment was negatived; and the draft clause, as read, was agreed to by the committee.

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113 Glynn goes on to become Attorney-General of South Australia, and Commonwealth Attorney-General in Deakin's 'Fusion' Government, Glynn also served in Joseph Cook and Billy Hughes' governments. He was commissioned as a King's Counsel in 1913, and was widely recognised for his knowledge of constitutional law.

114 *Con. Deb. Adel, 1897*, 629.

First Session, 19 April 1897

In the First Session in Adelaide on 19 April 1897, the Convention considered in committee draft Chapter II, "The Executive Government". Commencing with draft clause 58 which at that point read, "The executive power and authority of the Commonwealth is vested in the Queen, and shall be exercised by the Governor-General as the Queen's representative".[115] This was the first time the Conventions' delegates considered the operation of s 61 and its relationship to the prerogative in any detail. It is also the most substantial consideration of the execution aspect of the exercise of the prerogative by the delegates of any of the Federation Conventions. The debate was commenced by the Premier of New South Wales, the conservative George Houston Reid, who commenced by speaking of the devolution and investment aspect, and then the execution aspect. Reid said:[116]

> It will be observed that in clause 2 of chapter I. there is this provision:
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> > The Queen may, from time to time, appoint a Governor-General, who shall be Her Majesty's representative in the Commonwealth, and who shall have and may exercise in the Commonwealth during the Queen's pleasure, and subject to the provisions of this Constitution, such powers and functions of the Queen as Her Majesty may think fit to assign to him.
>
> I only call the attention of the Committee to that, and pass on to the clause now under consideration. For a long time I have been impressed with the view that since we are now expressing, in precise written characters, the various functions of the Governor, and conditions under which the power of the Commonwealth is to be exercised, it would be well in this clause, whilst providing that the

115 *Con. Deb. Adel, 1897*, 908.
116 *Con. Deb. Adel, 1897*, 908.

> Executive power and authority of the Commonwealth shall be vested in the Queen, and shall be exercised by the Governor-General as the Queen's representative, that we should add that which will in reality be the practice, that it is by and with the advice of the Executive Council.

After asking the delegates to "notice that the legislative powers in the Queen are expressed under Statute as being exercised with the consent of Parliament"; with the Queen setting "her seal upon Acts, and it is attested in the Acts themselves that they are by the authority and with the consent of the Parliament-that is, the two Houses of Parliament", Reid continued:[117]

> Now, I think we had better, since we are going to put in black and white the full functions of the Commonwealth, state what I deem will be the fact in practice, that the executive power is to be exercised by and with the advice of the Executive Council. I have looked through the works on the prerogatives of the Crown, and I find that they really came as far as anything in these colonies is concerned to the question of the right to assemble, dissolve, and prorogue Parliament, the pardoning of offenders, the issuing of proclamations, and so on. That is about the whole scope of the prerogatives which could be exercised under this Commonwealth. In the old country the Queen, of course, is the supreme head of the Church. That does not apply here. She has the power of making war or peace. That does not apply here. I am simply referring to things within the reach and range of this Constitution. In reference to the right to assemble, prorogue, and dissolve Parliament, that is always done on the advice and consent of the Executive Council. The refusal to receive advice is not an executive act at all. An executive act is something which affects the subjects of

117 *Con. Deb. Adel, 1897*, 908-909.

> the country. The refusal to do it affects no one, except that it creates a crisis and would probably effect a change of Ministers.

At this point, Edmund Barton interjected (focusing upon the execution aspect): "It is an exercise of the prerogative". Reid takes the interjection, and continued:[118]

> It is an exercise of the prerogative,s which is not an executive act. The refusal to accept advice does not fall within that category. The carrying out of the steps necessary for the assembling or proroguing of Parliament would, and that would be with the advice and consent of the Executive Council. There is not one appointment in the United Kingdom which the Queen makes, but that the counter signature of a Minister of State is required.

Victorian delegate, Simon Fraser, then asked: "How about a dissolution?"; Reid answered:[119]

> Supposing Ministers ask for a dissolution, and the Governor says "no"; that is not an executive act. It is a refusal to do an executive act. To issue a proclamation would be an executive act. This difficulty would not arise. It would leave the independence of the Governor as to accepting the advice of his Ministers absolutely intact. In England nothing can reach the state of an act affecting the subjects, unless there is the signature of a Minister to it. That is the practice all over the world under similar conditions. So I say that if the British Constitution were being reduced to black and white, that might be put in. If the British Constitution were being drawn up to-day, the main feature would be that the Queen must act on the advice of responsible Ministers. The moment she

118 *Con. Deb. Adel, 1897*, 909.
119 *Con. Deb. Adel, 1897*, 909.

> does not you have no constitutional Government at all.

Josiah Symon QC and Reid then had a short discussion in relation to the appointment of ministers and the effect of countersigning of appointments by ministers; Reid then returned to the relationship between draft cl 2 and the executive power:[120]

> … By section 2 of chapter I., Her Majesty would assign that prerogative to the Governor, amongst other prerogatives, which she would assign to him. That prerogative would remain in the Governor under section 2, chapter I. This executive power and authority of the Commonwealth is something different altogether from the prerogative of the Crown. The executive power and authority of the Commonwealth is a thing which must be exercised by Ministers. The other is a prerogative matter which is safeguarded by the section I have referred to.

An unnamed delegate then cried: "What about the dismissal of Ministers?"; to which Reid answered: "Even if Ministers are dismissed, they have to hold office until their successors are appointed".[121] Kingston corrected Reid: "Not dismissed; they resign". There was a short debate about the practical operation of a minister leaving office. Reid then asked the question:[122]

> What necessity was there to put in clause 2 that Her Majesty's representative could exercise Her Majesty's prerogative. What reason was there for it?

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120 *Con. Deb. Adel, 1897*, 909.
121 *Con. Deb. Adel, 1897*, 909.
122 *Con. Deb. Adel, 1897*, 909-910.

Symon QC answered: "No reason at all". Reid continued:[123]

> Well, it is put in. If we safeguard in this unnecessary way the prerogative of Her Majesty, and the prerogative of the Governor-General, surely we can put in black and white the principle of executive action which always is that the Governor shall act with the advice of the Executive Council. Why could we not understand all this? What is the use of putting it in at all? Did it not follow, as a mere matter of course, that if Her Majesty appointed a Governor-General to represent her, he would exercise the powers which she had and has?

The Leader of the Convention, Edmund Barton, noted that Reid:[124]

> … admits that what he desires is secured in section 61 [Constitution of Executive Council for Commonwealth], which is an adaptation of what is in the South Australian Constitution Act, and is somewhat similar to the Victorian Act, it is just as well not to take up much time in debating it.

Barton, making a substantial address that focused upon the execution aspect, offered his view that:[125]

> Executive Acts of the Crown are primarily divided into two classes: those exercised by the prerogative-and some of those are not even Executive Acts-and those which are ordinary Executive Acts, where it is prescribed that the Executive shall act in Council. These are the offsprings of Statutes. The others are Acts so far as they are not affected by Statutes. Now there is no necessity to

123 *Con. Deb. Adel, 1897*, 910.
124 *Con. Deb. Adel, 1897*, 910.
125 *Con. Deb. Adel, 1897*, 910.

> make any alteration in this clause. The clause has been drafted in precisely the ordinary way-it was similarly drafted in 1891-which is simply to express in a document of this character the depository of the Executive power in the kingdom or the Commonwealth. Moreover there is no necessity to add the words: With the advice of the Governor in Council, because in a constitution of this kind it is no more possible than it is under the English Constitution for the prerogative to be exercised as a personal act of the Crown. The prerogative is never in these days exercised as a personal act of the Crown as we understand it, but there are certain acts which have become, either by the gradual march of statute law or in any other way, nothing but ordinary executive acts and these are expressed to be exercisable only with the advice of the Executive Council. There are others again which have not been expressly affected by legislation, and while these remain nominally in the exercise of the Crown they are really held in trust for the people, although they are exercises of the prerogative. This is explained by Dicey in "The Law of the Constitution," and the extract I will read will be followed with interest by lay as well as by legal members.

Reid reminded delegates that Professor Dicey was writing of an unwritten constitution. Barton pointed out that the Crown only exercises the prerogative upon ministerial advice. Barton then explained what he sees as the difference between the exercise of a power by a governor, and a power by the governor in council. Barton then quoted Dicey on the role of the Cabinet and the exercise of the prerogative – and he did so at some length which it is unnecessary for present purpose to traverse.[126]

Reid, Barton and Fraser each made a number of small contributions – some more light-hearted in nature – all focused upon whether the clause – the vesting clause – ought to be textually qualified with words to the effect that the executive power of the Commonwealth

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126 *Con. Deb. Adel, 1897*, 910-911.

is exercised by the governor-general on the advice of the Executive Council. The delegates cite and quote Dicey, and Bagehot's *The English Constitution*, and generally considered the nature of the prerogative as understood in recent British parliamentary history. The delegates expressed some concern for how the lawyers of Whitehall will view the Australians' constitutional draftsmanship; concerned that the delegates might have incorrectly either expressed or touched upon the prerogatives of the Crown. New South Wales Secretary for Lands, Joseph Carruthers, made the final contribution to the debate about the nature of the prerogative, and, more importantly (to the delegates at least) how the prerogative is kept politically within the grasp of the proposed Commonwealth ministry. Carruthers said:[127]

> [Reid's] new argument shows that if the words were inserted they would at the very most be mere surplusage, and if this surplusage will satisfy the minds of the hon. members the surplusage is justifiable. I paid particular attention to the last argument, that it might possibly expose us to some adverse criticism from the home authorities in regard to the drafting of the Bill. I should think we would be prepared to put up with a little bit of criticism. We are not supposed to understand the whole of the laws of the Empire, and possibly if we make a mistake we will stand being corrected. We will not be like little little children-set our backs up in obstinacy because someone can point out how to do better. Mr. Barton first of all recites Dicey to show what occurs under the unwritten Constitution of England. But here we are framing a written Constitution. When once that Constitution is framed we cannot get behind it.

The debate shifted significantly. Reid asked "[w]hy should we have said the executive authority is vested in the Queen?" Carruthers then took the delegates to the heart of the

127 *Con. Deb. Adel, 1897*, 913.

relationship (as he saw it) between the "functions and powers" of the Sovereign in draft clause 2, and the "executive power and authority of the Commonwealth" then being considered by the committee. Carruthers' significant contribution addressed the recognition and affirmation aspect as well as the devolution or investment aspect. Carruthers said:[128]

> This is a Constitution which the unlettered people of the community ought to be able to understand. We have had it cited that in Canada a similar provision is enacted. But the provision in Canada is not similar. The provision in Canada uses words to this effect:
>
> > The executive power and authority of the Commonwealth shall continue and be vested in the Queen.
>
> That means simply that that executive power, which by the unwritten Constitution or the unwritten law was vested in the Queen, should remain so vested. The words "shall continue" have a very marked and clear meaning. You cannot "continue" the existence of a thing except in so far as it did exist. Here, however, is the creation of its existence. In the next place, in the Canadian Constitution there are no such words as we have in clause 2 of chapter I. If the Canadian Constitution had these words, how different the arguments would be. In clause 2 of chapter I. we specifically deal with the matters of the Queen's prerogative, and, having dealt with them, we provide that they shall and may be exercised by the Governor. The section reads:

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128 *Con. Deb. Adel, 1897*, 913-914. In quoting the provisions of the *British North American Act 1867*, Carruthers incorrectly uses the word "Commonwealth", rather than "Dominion". The then words of clause 2, chapter 1, are quoted *supra*.

> The Queen may, from time to time, appoint a Governor-General, who shall be Her Majesty's representative in the Commonwealth, and who shall have and may exercise in the Commonwealth during the Queen's pleasure, and subject to the provisions of this Constitution, such powers and functions of the Queen as Her Majesty may think fit to assign to him.

That is the section dealing with the prerogative rights, and all those matters cited by Mr. Barton are matters where the Queen must exercise her prerogative, and even her prerogative has been limited by the constitutional usage of the mother-country. Here all these matters, however, have been dealt with in clause 20, and are introduced for the first time in Federation Bills in this Bill. For what specific purpose? Surely the draughtsmen have some particular purpose in introducing this clause 2 of chapter I. It must have some meaning, and what does it really amount to? The very words of it clearly show that it relates wholly and solely to those matters which are matters of the Royal prerogative. We propose that they should be handed down to the Government under the advice of the Executive Council there. Then when we come to the next clause:

> The executive power of the Commonwealth is vested in the Queen.

That is totally different from the divesting of prerogative rights-a very different thing. Here we are handing over matters totally distinct from the prerogative rights, and the argument of my hon. friend goes to show that the executive powers must be exercised by and with the advice of the Executive, and if that be so, what harm can there be in clearly expressing within the Constitution itself what we mean? I hope that we shall not be detained for some hours in discussing this, when we have got the admission from Mr. Barton and the Drafting Committee that practically without these words the work will have to be done by

an Executive Council with a reference to the home authorities and constitutional usages. I hope the Committee will adopt the proposal of my hon. friend. In the pamphlet, "Notes on the Commonwealth Bill of 1891," Mr. G. P. Barton says:

> It is contended that this clause, as it stands, vests the executive power in the Governor-General independently of the Executive; and that it ought to have concluded with the words "acting by and with the advice of the Federal Executive Council." If those words had been inserted they would not amount to anything more than surplusage. Parliamentary Government being established as the basis of the Federation, the Governor-General could not act otherwise than "by and with the advice of the Federal Executive Council," unless he was prepared to take the responsibility of acting without it and against it.

We do not want to be put in this position, that the Governor could, if he liked, exercise this executive responsibility and powers, and we want to have the functions as set out in the clause distinguished from the exercise of the Royal prerogative. We do not want the Governor to have the power to do wrong; we want to have him limited by the terms of the Constitution Act, and kept to the straight paths by a Federal Judiciary.

At this point, Reid and Carruthers made two further short contributions to the debate, and then the clause – that is the vesting clause – as read, was formally agreed to by the Convention delegates during the in-committee stage.

The Convention then moved to consider clause 59, that: "There shall be a Council to aid and advise the Governor-General in the government of the Commonwealth, and such Council shall be styled the Federal Executive Council; and the persons who are to be members of the Council shall be from time to time chosen and summoned by the

Governor-General, and sworn as executive councillors, and shall hold office during his pleasure".[129] South Australian delegate, Patrick Glynn then questioned the desirability of having members of the Executive Council who do not serve as Ministers of the Crown (that is, executive councillors who are no longer "summonsed"). Symon attempted to put Glynn's mind (and other delegates' minds) at rest, when he said:[130]

> [Mr Glynn] has rather found a mare's nest, because he seems to be under the impression that the Governor will take it into his head to surreptitiously pack the Executive Council to the serious detriment of the Ministers of the State, and the public interests generally. We can hardly imagine under the present era of responsible government anything of the sort taking place, and if there was any idea that the Executive Council might be interfered with it is set at rest by clause 61, which says that the seven Ministers of State shall form the Executive Council. We want some fringe of ornament to the Constitution; it cannot all be prosaic.

The clause, as read, was agreed to by the Convention.

Second Session, 9 September 1897

In the Second Session in Sydney on 9 September 1897, the Convention continued its in-committee consideration of the Commonwealth of Australia Bill, commencing with the covering clauses of the proposed Bill. Draft covering clause 2 read:

> This act shall bind the Crown, and its provisions referring to her Majesty the Queen shall extend to her heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland.

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129 *Con. Deb. Adel, 1897*, 915.

130 *Con. Deb. Adel, 1897*, 915-916.

Sir George Turner was the first to speak:[131]

> I should like to call attention to these words, "This act shall bind the Crown." We know we have to send this bill to the Imperial Parliament to be passed. I cannot see why these words should be inserted. Of course the act will not bind the Crown unless the Crown is mentioned. But throughout the whole of the bill the Crown will be mentioned, and therefore the Crown will be bound. Sir Samuel Griffith has drawn attention to this matter. He says:
>
> This section begins with the words "This act shall bind the Crown" - an expression which is at least unusual in statutes, and which is surely unnecessary. How can it be suggested that an act in which the Crown is continually mentioned, and which establishes a new dominion under the Crown, does not bind the Crown?
>
> I fully concur with these remarks. I certainly would urge upon the hon. gentleman that he should omit these words.

New South Wales delegate (and future justice of the High Court of Australia), Richard O'Connor QC responded:[132]

> The hon. member will admit that it should be put beyond question that every portion of this act binds the Crown. It is true there are a number of sections which expressly bind the Crown, but this provision is inserted in order that it should be put beyond all doubt that every portion of the constitution binds the

131 *Con. Deb. Syd, 1897*, 225.
132 *Con. Deb. Syd, 1897*, 225.

> Crown. Although the form of expression is unusual, it has this to recommend it, it is very concise and carries out exactly our meaning. I see no reason for omitting the words.

Patrick Glynn made his contribution:[133]

> I would ask … Mr. Barton, whether he thinks that these words are sufficiently specific to negative the prerogative of the Crown? The intention undoubtedly is to prevent the possibility of our taking away the right of appeal to the Privy Council. In Canada the words used were, "Such judgment shall not be susceptible to appeal," but they were held to be insufficient. Lord Cairns, in a case in 1876 on which this question turned up, stated that the words must be definite and precise, that they must amount to a direct negation of the prerogative before they can take away the prerogative. The principal object of these words is to take away the royal prerogative so that subsequent portions of the bill may be effective. The Canadian act which was passed in consequence of that decision begins with the words, "Notwithstanding any royal prerogative." What I would suggest with deference to the judgment of others is that we ought in this section to distinctly negative the prerogative, because it will then operate right through the act. I think we should begin the clause with the words, "Notwithstanding any royal prerogative this act shall bind the Crown."

The context is important. Although he referred to a case in 1876, presumably Glynn was referring to either *Théberge v Laudry*[134] (a decision of the Board from December 1876), or

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133 *Con. Deb. Syd, 1897*, 225-226.

134 (1876) 2 App Cas 102; which affirms the prerogative power of the Queen in Council to hear appeals from the dominions, unless expressly removed by statute.

Johnston v Minister and Trustees of St Andrews Church, Montreal[135] (also a decision of the Board, from December 1877), with both judgments being delivered by Earl Cairns LC. It is to be remembered that by preventing "the possibility of our taking away the right of appeal to the Privy Council", Glynn was referring to the prerogative right to appeal to the Queen in Council (meaning in reality, the Judicial Committee of the Privy Council). Glynn was speaking at a time before compromise was achieved that resulted in what ended up being s 74 of the Constitution – the right of appeal to the Queen in Council – being included in the draft Bill. Glynn's argument was based on the first principle that the prerogatives of the Crown pre-exist the Constitution (and are therefore not originally sourced in the Constitution), and survive the enactment of the Constitution, subject to the language of the constitutional text.

An unnamed delegate asked: "Will not those words be too strong?". Glynn responded:[136]

> The fact that Sir Samuel Griffith did not understand the meaning of the words proves that they cannot be strong. He, as a distinguished lawyer, must be admitted to know that the prerogative must be taken away by express words, or it will still remain.

O'Connor responded that Sir Samuel thought "they were not necessary", and "[t]hat was his objection!"[137] Glynn retorted, Griffith "did not see the object for which they were inserted". O'Connor replied, "[h]e did not see the necessity!"[138] Mr Glynn further developed his point:[139]

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135 (1877) 3 App Cas 159; and which also affirms the prerogative power of the Queen in Council to hear appeals from the dominions, where it is "untouched and preserved" by statute.

136 *Con. Deb. Syd, 1897*, 226.

137 *Con. Deb. Syd, 1897*, 226.

138 *Con. Deb. Syd, 1897*, 226.

139 *Con. Deb. Syd, 1897*, 226.

> If the object had been accomplished he would have seen that at once. As the hon. and learned member, Mr. O'Connor, has pointed-out, the act does bind the Crown. In clause 1 of the constitution the Crown is distinctly stated to be part of the commonwealth, and a section in an act of Parliament must bind the Crown, because the Crown in one of the consenting parties to the legislation. I would call attention to the fact that the prerogative ought to be distinctly negatived in the act.

Whilst this small portion of the debates of the Second Session does not demonstrate a wide acceptance of the principles therein debated, it does evince that Patrick Glynn was acutely aware that the prerogative both pre-dates the Constitution, and survives the enactment of the Constitution, to the extent that the Constitution does not expressly or impliedly negative the operation of the prerogative, or some part thereof.

Second Session, 17 September 1897

In the Second Session of the Convention in Sydney on 17 September 1897, during the in-committee consideration of draft clause 63 (the forerunner to section 64 of the Constitution), the first Premier of Western Australia, Sir John Forrest drew an issue to his fellow delegates' attention:[140]

> I desire to call the attention of … Mr. Barton, to the use in this and other clauses of the terms "governor-general in council", and "governor-general." It seems to me that it will cause less confusion if the term "governor-general" is adopted throughout.

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140 *Con. Deb. Syd, 1897*, 804.

Barton asked the leader of the Western Australian delegation if he wanted to know why the words "in council" are sometimes used and sometimes omitted? Sir John replied "yes", and explained:[141]

> The practice has now become almost general in acts of parliament to avoid the use of the words "in council", and to use only the expression "the governor." The term "governor" constitutionally is well known, and is understood to mean the governor acting with the advice of his responsible ministers. If you use the words "in council", a doubt arises as to whether the governor is expected to act on his own responsibility or with the advice of his ministers. In the Constitution Act of Western Australia there is some confusion owing to the use of the terms "governor in council" and "governor." The term "governor-general" will be thoroughly understood, and I think there is no necessity to add the words "in council". In clause 63 it is provided that the appointment of officers to administer the departments shall be made by the "governor-general in council", while in clause 64 the designations of ministers holding different offices is to be fixed by the parliament or by the "governor-general". If it were a matter of prerogative I do not suppose it would be left to the parliament; as it is not a matter of prerogative, I expect the governor-general in council is meant. My own experience leads me to the conclusion that the words "in council" should not be used if they can be avoided.

Barton replied:[142]

> The distinction is this: Where the act is done by the governor-general or by the authority of the Crown it is done upon-prerogative. When the act is not a

141 *Con. Deb. Syd, 1897*, 804.
142 *Con. Deb. Syd, 1897*, 805.

> prerogative act, when it is an administrative or executive act, then the term "in council" is used. It is a fallacy to suppose that any distinct act is done by the governor of the colony, even upon prerogative, with the advice of ministers. One might say more than that.

Forrest then asked where is the prerogative in the last line of clause 64? Barton answered:[143]

> I was endeavouring to explain a matter to the hon. member, which it is quite evident from his question is not generally understood. The reason of the difference in this bill is founded on that question. I am not unmindful that there is a difference in clause 63. In that very clause the term "governor" is used in one place, and the term "governor-general in council" in another, for this reason: that the appointment of ministers is a prerogative act, but the mere establishing of a department of state is not an act of prerogative, but an executive act which generally requires the authority of a statute, and rests on the authority of a statute in this case. That is the reason of the difference in this case, and the hon. member will find it running right through the bill. I hope there will be no debate on questions of that kind in this Committee. The whole matter was considered at very great length in Adelaide by the Constitutional Committee. It was threshed out in a long debate there. There was, again, in Adelaide, in Committee of the Whole, as my right hon. friend, Mr. Reid, will recollect, a long and keen debate on the subject, and I think we all came to an understanding about it. I think the hon. member will be assured by any legal member of the Convention that the right distinction has been used throughout the bill. In defining those executive acts which are done as mere acts of prerogative and those which are done in the

143 *Con. Deb. Syd, 1897*, 805.

> ordinary execution or administration of government apart from the prerogative.

The "whole matter" which was considered "at very great length" in Adelaide, and the reference to "Mr Reid" must surely be a reference to the debate concerning the Executive Government, which was commenced by George Reid on 19 April 1897 at the First Session of the Convention. It is important to note that Sir John Forrest and the Western Australian delegates left the First Session of the Australasian Federal Convention in Adelaide on 14 April 1897[144] – three days prior to the lengthy debate set out *supra*; therefore, Sir John would have been unaware of the detail of that debate, and the settled nature of the constitutional principles therein considered.

Returning to the present debate, the Victorian delegate (and then current Attorney-General of the colony), Isaac Isaacs attempted to refine the point:[145]

> If I caught the question of … Sir John Forrest, aright, he drew a distinction between clause 63 and clause 64. He has not quite gathered the sense of these two clauses. There is no discrepancy whatever between the two. In clause 63 the appointment of ministers is by the governor-general. The reference to the governor-general in council is not to the appointment of ministers, but to the establishment of departments of state. It means that the governor appoints his ministers by virtue of the prerogative, but that when he comes to establishing a department, he acts by the advice of his ministers. But, in clause 64, the expression "governor-general" is used because it would be impossible to put in the expression "governor-general in council" there, for this reason: it says the ministers shall hold such offices and by such designation as the parliament from time to time prescribes, or, in the absence of provision, as the governor-general from time to time directs.

144 *Con. Deb. Adel, 1897*, 603.
145 *Con. Deb. Syd, 1897*, 805.

> Ministers are in the first instance to be appointed before there is a council. There is not to be a parliament until there is a ministry, and the parliament has to be summoned by the governor-general.

There were no further substantive contributions to the debate on this issue. Forrest and Barton had a slightly terse exchange about the reasonableness of Forrest's question, and then the Convention moved on after formally agreeing to the clause.

The significance of this small portion of the debate from the Second Session of the Second Convention is that it demonstrated that Edmund Barton (and others) held a view that there was a substantive difference between a prerogative act and an "administrative or executive act". A prerogative act (that is, an exercise of the prerogative power) is done by the Sovereign and is, without more, done "on advice"; whereas an executive act (according to Barton) generally requires the authority of a statute, which necessitates the inclusion of the words "in council" so as to ensure that that power is exercised on the advice of the Federal Executive Council. This small portion of debate tends to demonstrate that Barton held the view that the prerogative did not emanate from the constitutional text. An executive act, in this case, "rests on the authority of a statute"; whereas it is implicit that a prerogative act rests on the authority of something other than the constitutional text.

VII Three Conclusions That Should Be Formed

The purpose of this chapter has been to identify those aspects of the Debates of the National Australasian Convention and the Australasian Federal Convention that considered the operation of the prerogatives of the Crown, the executive power of the Commonwealth, and the relationship between the two. The *Official Reports* and the *Official Records* have been analysed for more than mere historical interest.

Interestingly, professional historians have erred in what they say should be made of the Conventions' in-committee consideration of the "Queen's Ministers of State" affirmation

in s 64. Professor John Hirst misread the in-committee consideration of the draft cl 4 on 6 April 1891. He read that debate as relating to the "executive power of the Commonwealth" which is "vested in the Queen and exercisable by the Governor-General"; he pointed out that Griffith "wrote those words and defended them".[146] In doing so, he incorrectly interpreted the relevant portions of the Debates as relating to s 61 and the executive power of the Commonwealth. Professor Roger Joyce in his *Samuel Walker Griffith*, correctly identified the importance of the in-committee consideration in respect of the express vesting of the prerogative in the Commonwealth Government,[147] but he then erred by observing that the affirmation in draft cl 4,[148] that the Federal ministers were "Queen's Ministers of States", did "not survive later revisions",[149] being later versions of the Commonwealth Bill.

Consistent with the permissible interpretational purposes identified in *Cole v Whitfield* and in *Singh v Commonwealth*, the author has attempted to do two analytical tasks. First, the author has sought to identify the contemporary meaning of language used, the subject-matter to which that language was directed and the nature and objectives of the movement towards federation, that can be ascribed to some or all the members of each Convention. In this way, the author has attempted to identify "the subject-matter of discussion" and "what was the evil to be remedied",[150] or object that the framers sought to address or achieve in the choice of constitutional language. Second, the author has sought to identify the mischief or object of the framers which demonstrates the correctness of the core argument. With history being a relevant – and indeed, in vogue – modality of interpretation, an historically-based argument ought to be particularly attractive.

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146 J Hirst, *The Sentimental Nation*, 31.

147 R B Joyce, *Samuel Walker Griffith*, 199-200.

148 Subsequently s 64 of the Constitution.

149 R B Joyce, *Samuel Walker Griffith*, 200.

150 Using the language of Griffith CJ in *Municipal Council of Sydney v Commonwealth* (1903) 1 CLR 208, 213-214.

As to conclusions that should be drawn, French CJ in *Williams [No 1]* expressed a view that:[151]

> There is little evidence to support the view that the delegates to the National Australasian Conventions of 1891 and 1897-1898, or even the leading lawyers at those Conventions, shared a clear common view of the working of executive power in a federation. The Constitution which they drafted incorporated aspects of the written Constitutions of the United States and Canada, and the concept of responsible government derived from the British tradition. The elements were mixed in the Constitution to meet the Founders' perception of a uniquely Australian Federation.

Whilst the Chief Justice may be correct in opining that there was no "clear common view of the working *of executive power*", that observation is to be contrasted with the framers' views as to the operation of the prerogative within the Australian constitutional framework.

Three Conclusions

The author has identified three conclusions (or "evils to be remedied"), and consequently three purposes or understandings that can be attributed to the framers in relation to the prerogative. That is, three interpretative understandings that are clear enough within the Debates as falling within the legitimate interpretative purposes identified in either *Municipal Council of Sydney*, or *Cole v Whitfield*. This author has also identified one significant coincidence that, when taken with these three conclusions, adds interpretative strength to the three conclusions.

First, in enacting the words "… and shall be the Queen's Ministers of State for the Commonwealth" in s 64, the mischief being remedied by the framers was the textual

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151 *Williams [No 1]* (2012) 248 CLR 156, 202 [56] (French CJ).

recognition or affirmation of the continued operation of the prerogatives of the Crown by the Commonwealth, and the devolution or investment of the prerogatives in the Crown in right of the Commonwealth. The framers were clearly united in their desire to ensure that the constitutional defect (as they saw it) for the colony of Victoria identified in *Toy v Musgrove* – that is, the inability of the Victorian executive government to exercise the prerogatives of the Crown (in relevant respects) ought to be expressly corrected in the Commonwealth Constitution. As Andrew Inglis Clark wrote in relation to interpreting a written constitution:[152]

> … that language must be interpreted by the judiciary consistently with a proper use of it as an intelligible vehicle of the conceptions and intentions of the human mind, and consistently with the historical associations from which particular words and phrases derive the whole of their meaning in juxtaposition with their context.

With these principles in mind – the historical associations and the juxtaposition with their context – it can be said that so detailed was the debate; so clear was the contribution of leading delegates (like Deakin and Wrixon), and the absence of any subsequent debate about the appropriateness and utility of the expression "Queen's Ministers of State" in s 64 in the First and Second Conventions, all lead to a comfortable conclusion that the expression "and shall be the Queen's Ministers of State for the Commonwealth" ought to be accepted as textually recognising the prerogatives of the Crown which are appropriate to the Australian context at Federation. Furthermore, it is clear that the "Queen's Ministers of State" expression in s 64 implicitly permits, or requires (as in terms of the devolution and investment, and execution aspects) the prerogatives of the Crown in right of the

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152 A Inglis Clark, *Studies in Australian Constitutional Law*, 21. Inglis Clark went on to say, at 26: "Its interpretation must take place in the light of facts which preceded and led to it; in the light of contemporaneous history, and of what was said by the actors and the ends they had in view".

Commonwealth are to be exercised by the governor-general, and that it is for the Commonwealth ministers of state to tender the advice to exercise the devolved prerogatives.

Michael Crommelin has said that the inclusion of the "Queen's Ministers of State" reference in what became s 64 "seems hardly adequate as a means of achieving this end [being the recognition of the prerogative]".[153] When regard is had to the history of *Toy v Musgrove*, and the contents of the debate about the prerogative set out in this chapter, it is difficult to agree with Professor Crommelin's observation. He is right, the expression is "merely descriptive",[154] but that is the point – the description implicitly demands the recognition of the prerogative.

Second, having formed that conclusion about the expression "Queen's Ministers of State" in s 64, we can also form the conclusion that the framers did not see, or identify, the vesting clause (s 61 of the Constitution), as recognising, or devolving and investing, the prerogatives of the Crown (as were thought appropriate to the Commonwealth at Federation) in the Queen. Despite debating the textual options to effect devolution and investment of the prerogative during the committee of the whole consideration of draft Chapter II (concerning "The Executive Government") during the National Australasian Convention in 1891, no delegate identified the vesting clause as achieving the purpose that the delegates were seeking to achieve.

In fact, again, Professor Crommelin's observation in respect of what became s 2 of the Constitution – that is it "was not seen as the means of conveying these prerogative powers",[155] is, respectfully, incorrect if his observation is intended to mean that there was no consideration of the conveyance of the prerogative at all during the Conventions. The *Official Records* of the First Session in Adelaide on 19 April 1897, coupled together with

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153 M Crommelin, "The Executive", in G Craven, *The Convention Debates, 1891-1898: Commentaries, Indices and Guide*, 134.

154 Ibid.

155 Ibid 134-135.

Edmund Barton's remarks in Sydney to Sir John Forrest demonstrates that there was a clear view about the operation of s 2 that was formed by the delegates.[156]

Third, as a corollary, it can be concluded that the leading members of the Conventions understood that the executive power of the Commonwealth and the prerogatives of the Crown were two separate and distinct powers exercisable by the Crown in right of the Commonwealth. The sharpness of this conclusion is emphasised by the detailed explanation of the difference between a prerogative act and an executive act by the Leader of the Second Convention, Barton, as set out *supra*. That Barton identified a textual feature (the different uses of the terms "governor-general in council", and "governor-general") in the draft Federation Bill, demonstrated (coupled with his belief that "any legal member" of the Convention would be aware of the distinction) that there was a generally accepted differentiation between the identification of prerogative acts and executive acts (and therefore prerogative power and executive power) by the members of the drafting committees that were charged with placing proposed text before all the delegates.

Whilst it is possible to identify aspects of the Debates of both the two Conventions which show that individual delegates were ignorant of the three objects, purposes or understandings identified above, it is suggested that there are matters that give these conclusions some weight. The seniority of the delegates who made the key contributions to the relevant debates that give rise to each object or understanding; the fact that these aspects of the debates involved the delegates who were recognised within and outside the Conventions as the leading constitutional lawyers of the day; and the fact that in each of these debates, the conclusions that this author has identified were not challenged or contradicted in any meaningful way subsequent to the aspect of the debate identified, are three matters that weigh against the objects, purposes or understandings being described as merely subjective.

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156 *Con. Deb. Syd, 1897*, 805.

None of these three conclusions undermine the observation by the Chief Justice in *Williams [No 1]* that there was no clear common view of the working of the executive power. This author does not cavil with that observation in respect of the executive power. What is posited in contradistinction is that there is sufficient evidence in the Convention Debates that the three conclusions described above (relating to the operation of the prerogative) are able to be distilled, and are properly attributable to the framers.

The three conclusions have significant interpretative power. That is, they have persuasive force in identifying the legitimate interpretive purposes identified in *Municipal Council of Sydney*, *Cole v Whitfield*, and *Singh*, and allow the framers' intentions to be legitimately used as interpretative tools.

More particularly, the three conclusions are not relied upon to support the core argument because they reveal what the leading delegates at the Conventions thought on any one topic or issue simpliciter. Rather, they are relied upon because the three conclusions can be drawn (and only drawn) having regard to the depth and detail of the consideration of the "evil to be remedied" (in the *Municipal Council of Sydney* sense) during the Debates; because of the esteem and learning demonstrated by the leading delegates who contributed to those Debates at the relevant points in time; and because of the implicit widespread acceptance of the accuracy of each of the leading delegates' contributions to the Debate at the relevant times. Also, in the case of the meaning of "executive acts", the fact that the Western Australian delegates were politely admonished for their ignorance of the matters that were thought to be resolved at the First Session in Adelaide has interpretative force.

The depth and detail in which the Debates went into legitimately permits the drawing of the three conclusions which justify the operation of the exceptions contained in Griffith CJ's statement in *Municipal Council of Sydney*, and Gleeson CJ's statement in *Singh*. The drawing of these three conclusions is also consistent with what was said by Gleeson CJ and McHugh J in *Brownlee v The Queen*,[157] where their Honours opined:[158]

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157 (2001) 207 CLR 278.

> In the resolution of a problem as to the interpretation of the Constitution, the significance of the circumstances surrounding the framing of the instrument will vary according to the nature of the problem. An understanding of the context in which an instrument was written is ordinarily useful, and sometimes essential, for an understanding of its meaning. To recognize that is not to treat the subjective understanding of the framers, if it is possible to find any such common understanding, as the determining factor in a dispute about interpretation. It is simply to accept the historical context in which an instrument was written, which such an understanding may reflect, as potentially relevant to a question about the meaning of the instrument. Similarly, the genesis of an instrument may throw light upon its meaning. In the case of an ordinary statute, so much is expressly recognized by s 15AB of the *Acts Interpretation Act 1901* (Cth). The same can apply in the case of the Constitution.

A Significant Coincidence

As foreshadowed, in addition to the three conclusions identified, this author also points to an important coincidence which, because of the content of the amendment to the draft constitutional text, and the precise time at which the amendment was made, fortifies the interpretative strength of the three conclusions drawn in this chapter.

As French CJ pointed out in *Pape*,[159] the draft constitution, as adopted by the National Australasian Convention on 9 April 1891, in Ch II dealing with the Executive Government, contained the following two draft clauses:

1. The Executive power and authority of the Commonwealth is vested in the Queen, and shall be exercised by the Governor-General as the Queen's

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158 (2001) 207 CLR 278, 285 [8] (Gleeson CJ and McHugh J).

159 (2009) 238 CLR 1, 57 [119].

Representative.

...

8. The Executive power and authority of the Commonwealth shall extend to the execution of the provisions of this Constitution, and the Laws of the Commonwealth.

The Chief Justice in *Pape* pointed out that these two draft clauses were reproduced in the draft Constitution approved by the Australasian Federal Convention at Adelaide in April 1897, but were renumbered as cll 60 and 67.[160] These two draft clauses were condensed into what became cl 61, now s 61 of the Constitution, at the Melbourne Convention in 1898.[161]

What is of particular interest is the timing of the drafting of the text in draft cl 8 from 1891, and the inclusion of the words "… shall extend to the execution of the provisions of this Constitution, and the Laws of the Commonwealth". A close examination of Griffith's *Successive Stages*, and in particular, Griffith's "number 15", which is described as "Copy of Draft Used by Griffith, 1-8 April 1891", reveals that the inclusion of the statement that the Federal Ministers "shall be the Queen's Ministers of State for the Commonwealth" was added to draft cl 4 of the 1891 draft during *exactly the same* in-committee consideration as the language of draft cl 8, which was therein significantly amended. As can be seen from pages 377 and 379 of Williams' *The Australian Constitution*, draft cl 8 previously read:[162]

8. The Executive power and authority of the Commonwealth shall extend to all matters with respect to which the Legislative powers of the Parliament may be exercised, excepting only matters, being within the Legislative powers of a

160 (2009) 238 CLR 1, 57 [119].

161 (2009) 238 CLR 1, 58 [121].

162 J Williams, *The Australian Constitution*, 379; see also *Con. Deb. Syd, 1891*, 777.

> State, with respect to which the Parliament of that State for the time being exercised such powers.

As can be seen from the facsimile of Griffith's "number 15", Griffith has struck through all the words after the words "extend to" in draft cl 8, and, inserted a slip of paper with the words typed, under the heading "Chapter II, Section 8.": *Omit all words after* "extend to" *to end of the section and insert* "the execution and maintenance of this Constitution, and the Laws of the Commonwealth."[163] The words "the provisions of" creep into the draft clause before it reappears in Griffith's "number 16".[164]

In fact, the sequence of events is even more exquisite than that. The language of draft cl 4 – the provision which was amended to include reference to the Federal Ministers being "the Queen's Ministers of State for the Commonwealth" – was amended by the delegates in-committee on the afternoon of 6 April 1891.[165] Immediately after amended draft cl 4, the delegates proceeded to a short consideration of draft cl 6, which concerned the sum payable from consolidated revenue to the Queen for the salaries of the Ministers, and then the delegates moved on to consider draft cl 8 which was then currently drafted pursuant to the text described above. Griffith opened the consideration of draft cl 8 by saying:[166]

> This afternoon I have had circulated an amendment which I propose to make in this clause. It does not alter its intention, though it certainly makes it shorter. As the clause stands, it contains a negative limitation upon the powers of the executive; but the amendment will give a positive statement as to what they are to be. I move …

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163 J Williams, *The Australian Constitution,* 377 and 379 (original emphasis).
164 Ibid 401.
165 *Con. Deb. Syd, 1891*, 776.
166 *Con. Deb. Syd, 1891*, 777.

Griffith then went on to set out the words of his amendment:[167]

> That in line 2 all the words after the words "extend to" be omitted with a view to the inclusion in lieu thereof of the words "the execution of the provisions of this constitution, and the laws of the commonwealth".

Quite erroneously, Griffith then went on to say: "That amendment covers all that is meant by the clause, and is quite free from ambiguity".[168] The amendment is then agreed to, and draft cl 8, as amended, is agreed to.

Particular attention should be taken of Griffith's opening words, "This afternoon *I have had circulated an amendment* which I propose to make in this clause".[169] What is Griffith referring to? When Griffith's *Successive Stages* is examined closely, the circulated amendment must be the slip of paper which contains the proposed words of the amendment, and found at page 377 of Williams' *The Australian Constitution*. Therefore, it is clear that there are two factual observations that can be made, and which amount to a significant coincidence. First, the delegates amended draft cl 4 to include references to the Federal Minister's being the Queen's Ministers of State for the Commonwealth on *exactly the same day*, and indeed the *same afternoon*, as they considered the language which eventually (after the Second Convention) became the closing words of s 61 of the Constitution. And secondly, not only did the delegates have a draft bill which contained the then draft words for draft cl 8 in front of them whilst they were considering draft cl 4, they also had a piece of paper – presumably circulated to all of them – which set out Griffith's proposed amendment to draft cl 8 that the executive power and authority should extend to the execution of the Constitution, and the laws of the Commonwealth.

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167 *Con. Deb. Syd, 1891*, 777.
168 *Con. Deb. Syd, 1891*, 778.
169 Emphasis added.

What should be made of this? The fact that the textual affirmation that the Federal Ministers are to be the Queen's Ministers of State for the Commonwealth occurs on the *exact same day* during the in-committee consideration of the wording of draft cl 8 – wording that went on to become half of s 61 of the Constitution, and is the text which comes the closest to describing the executive power of the Commonwealth – must have *some* interpretative value. If the statement that the executive power of the Commonwealth extends to the maintenance and execution of this Constitution, and the laws of the Commonwealth is the textual recognition and affirmation of the prerogative, the proximate relationship between when these two issues were considered in some depth by the delegates is a striking coincidence, and of itself has interpretative value. Why then, when crafting the language that became this phrase from s 61, did the framers make no mention of it when they were debating in quite some detail how to textually devolve and invest the prerogatives of the Crown? Surely it would have been easy for Griffith, or any other leading delegate to point to draft cl 8 when they were asked about the recognition of the prerogative into the constitutional text? It is a significant coincidence that the text of draft cl 8 was so significantly amended – on precisely the same day and afternoon of the in-committee consideration that dealt with the textual devolution and investment of the prerogative – and *no* member of the First Convention saw "the Executive power and authority of the Commonwealth" as *in any way* touching upon the objective that the framers sought to achieve by declaring that the Federal Ministers were to be the Queen's Ministers of State for the Commonwealth. The conclusion to be drawn is that when the delegates were considering the inclusion of the prerogative in the constitutional text, and also the language of the executive power of the Commonwealth, not a single delegate drew any correlation between the two – the natural conclusion to be drawn is that draft cl 8 did not then, in the minds of *all or any* of the delegates present, and should not now, be seen as textually recognising, affirming, devolving to, or investing the prerogatives of the Crown.

CHAPTER FIVE

CHALLENGING THE ORTHODOXY

I INTRODUCTION

The purpose of this chapter is to build upon the analysis of the prerogative in previous chapters, draw together various aspects of the theorem, and set out the core of the argument advanced in this thesis.

This is done through four steps. First, this chapter sets out the history of how the High Court of Australia has come to see the prerogatives of the Crown being textually recognised in the Constitution. The chapter does this by identifying what the older authorities of the High Court understood the relationship between the prerogative and s 61 of the Constitution to be; the chapter then sets out what is the current, or orthodox, view of the relationship between the prerogative and s 61 of the Constitution.

Second, attention is then focused upon the jurisprudence which has emerged in the *Pape, Williams [No 1]*, *Williams [No 2]* and *CPCF* decisions in relation to the executive power of the Commonwealth. That is done by identifying the two schools of thought in relation to the executive power of the Commonwealth (the inherent view, and the common law view) and how those two schools conceptualise the recognition of the prerogative. Support for each of the two schools of thought in the literature is identified. It is necessary to delve into s 61 jurisprudence as the High Court continues to hold the view that s 61 textually incorporates the prerogatives of the Crown.[1]

1 *Cadia Holdings v New South Wales* (2010) 242 CLR 195, 226.

Third, having traversed these matters, the chapter then sets out the core of the argument in this thesis (the "core argument"). The core argument advances a theory that runs counter to the orthodoxy that the prerogatives of the Crown are a limb of the executive power of the Commonwealth, and are textually recognised in the Constitution by section 61 of the Constitution; the theory is that the words "and shall be the Queen's Ministers of State for the Commonwealth" are a textual recognition and affirmation of the continued existence and operation of the prerogatives of the Crown, in that they are exercisable by the Queen's Ministers of State, and are made *exercisable* by the Commonwealth pursuant to s 61; but are not sourced in s 61.

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Thirty years ago, Professor Michael Crommelin observed that:[2]

> The executive branch of government was shrouded in mystery, partly attributable to the uncertain scope and status of the prerogative. The task of committing its essential features to writing was daunting indeed. Moreover, the price of undertaking that task would be a loss of flexibility in the future development of the executive. Politicians who were the beneficiaries of half a century of colonial constitutional development placed a high value upon such flexibility.

This uncertainty as to the "scope and status of the prerogative" is the reason this dissertation is written. This challenge to the orthodoxy is a by-product of the debate about how to (or indeed whether to at all) incorporate the principle of responsible government into the Australian Constitution. As the previous chapter set out in detail, the framers

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2 M Crommelin, "The Executive", in Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, 127, 147, and approvingly quoted by Gummow and Hayne JJ in *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, 220.

struggled to reconcile the principle of responsible government with the American constitutional example of two chambers of co-equal power. If the lower house of parliament is to be the popular house and the chamber whose confidence is required for the formation of a ministry, how is that to be reconciled with an upper house whose confidence is required for the passage of appropriation bills and is elected on some other basis than a popular election of the people of the new States? The by-product of this debate was an examination of the powers of the ministry which was to have the confidence of one or both of the chambers of the new parliament, and, the question of who should be answerable to which chamber for the advice tendered to the Crown regarding the exercise of the prerogative.

As previously identified, in drafting the Constitution, the First and Second Conventions adopted the traditional parliamentary practice, which would have been familiar to all the delegates as men of standing in the various colonial parliaments, of considering the bill by the Committee of the Whole of the Convention, or "in-committee". That is, the Conventions considered the various drafts of the Commonwealth Bill clause-by-clause. It is through this process that constitutional policy issues revealed themselves to the delegates, and allowed a sharpness of analysis. In this context, the question of the textual recognition of the prerogative came close to the surface while the framers were considering the broader issue of the textual recognition of the principle of responsible government.

Professor Crommelin's observation *supra* summarises the sentiments expressed by the framers during the in-committee process, and by the uncertain state of the jurisprudence that had arisen since Federation in respect of this issue – possibly because of the lack of weight attributed to the expressions of opinion by the delegates during the drafting process in respect of the recognition of the prerogatives of the Crown.

Compounding the problem, the pre-Federation state of English jurisprudence left precious-few sources of case law for the framers to obtain a sharpened understanding of the nature of the prerogative. As already said in the Introduction, "no case on the

prerogative came before the House of Lords after the seventeenth century Revolution Settlement until the immediate aftermath of the First World War".[3]

II IDENTIFYING THE ORTHODOX VIEW

This dissertation challenges two judicially-settled, or orthodox views. It challenges the view that the prerogatives of the Crown are textually recognised or affirmed in the Constitution by virtue of the words of s 61 of the Constitution. It also, as a consequence of that first contested proposition, challenges the method of construing the executive power of the Commonwealth. This second challenge is a natural consequence of the first.

The words of s 61 of the Constitution have been described by a leading constitutional scholar as "meagre and highly abstract".[4] A more recent commentator has said of the text of s 61: "These meagre words give very little idea of the content of the executive power unless regard is had both to the common law and to the federal system within which the Commonwealth operates".[5] That statement of methodology sits uncomfortably with what Gummow J (then a puisne judge of the Federal Court) said in *Re Ditfort; Ex parte Deputy Commissioner of Taxation*.[6] In oft-quoted dictum, his Honour said:[7]

> In Australia … one looks not to the content of the prerogative in Britain, but rather to s 61 of the Constitution, by which the executive power of the Commonwealth was vested.

This was, prior to *Pape*, *Williams [No 1]* and *Williams [No 2]*, incorrect. The better view prior to that trinity of cases, and consistent with the older authorities outlined below, was,

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3 B Hadfield, "Constitutional Law", in L Blom-Cooper, et al, *The Judicial House of Lords, 1876-2009*, 504.

4 L Zines, "Commentary", in H V Evatt, *The Royal Prerogative*, C5.

5 J Stellios, *Zines's The High Court and the Constitution*, 371.

6 (1988) 19 FCR 347.

7 (1988) 19 FCR 347, 369.

Zines said, that "[t]he nature of what lies within the sphere of the executive branch of government necessarily requires an historical understanding".[8]

The Older Authorities

Until the Whitlam government, there were very few cases that came before the High Court of Australia that considered the operation of the executive power of the Commonwealth. The existence and application of the prerogative of the Crown was only ever a secondary issue in the earlier cases.

The first real judicial consideration of the relationship between s 61 of the Constitution and the prerogatives of the Crown was offered by Sir Isaac Isaacs in *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (the *Wool Tops case*),[9] where his Honour opined:[10]

> Sec[tion] 61 makes three declarations as to the executive power of the Commonwealth. Observe, it is not as to the Executive Government of the Commonwealth or as to the powers of the Government, but as to the "executive *power* of the *Commonwealth.*" As to that "power," it declares that it *(a)* is vested in the sovereign, *(b)* is exerciseable by the Governor-General as the Sovereign's representative, *(c)* "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." The reference to the Governor-General as the representative of the Sovereign must be read with sec. 2 of the Constitution, which constitutes him such representative. As to the first declaration it is a renewed statement of the law and introductory of what follows. *Blackstone* (vol. 1., p. 190) says: "The Supreme executive power of these Kingdoms is vested by our laws in a single person, the King or Queen." In

8 L Zines, "The inherent executive power of the Commonwealth", (2005) 16 *Public Law Review* 279.

9 (1922) 31 CLR 421.

10 (1922) 31 CLR 421, 437.

> *Halsbury's Laws of England* (vol. VI., p. 318) it is said: "The executive authority is vested in the Crown as part of the prerogative." The second declaration need not be further considered now. The third is very important. It marks the external boundaries of the Commonwealth executive power, so far as that is conferred by the Constitution, but it leaves entirely untouched the definition of that power and its ascertainment in any given instance.

Isaacs J continued:[11]

> But the third declaration is an essential starting-point, and the extent it marks out cannot be exceeded. The argument upon those words included various contentions; as, for instance, that the executive authority of the Commonwealth Government embraced all the common law powers of the Imperial Government, and that "laws of the Commonwealth" included the common law - that once find a given subject matter within the ambit of the Constitution the legal power to make the agreement existed, and, what I regard as very crucial, though I do not agree with it, that the written words of the Constitution applied to sec. 61 form the only necessary solving test. These contentions convince me that the proper construction of the enactment requires a deeper consideration than I should have otherwise thought necessary. Sec. 61, when carefully examined, simply applies to the new constitutional structure, the Commonwealth, but with the necessary adaptation, the basic principle of the law of the Empire that the King is indistinguishably the King of the whole Empire, but that the springs of royal action differ with locality.

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11 (1922) 31 CLR 421, 438.

Read carefully, it is suggested that this judicial opinion is supportive of the core argument set out below. Isaacs J made the point that s 61 is declaratory of the pre-existing state of the law – that the executive power belongs to the Crown, and that the executive power *is part of* the prerogative. Isaacs J did not, it is suggested, say that the prerogative stems *from* the executive power, or that s 61 is the source of the prerogative; rather "the Supreme executive power" or the "executive authority" is vested in the Crown; and his Honour identified Sir William Blackstone and the first Earl of Halsbury as authorities for those basal propositions. Read incorrectly, Sir Isaac Isaacs is identified as an authority for the proposition that the prerogatives of the Crown are vested in the Crown by virtue of s 61 of the Constitution.

Ten years later, Evatt J appeared to arrive at the same construction of s 61 as Isaacs J did in the *Wool Tops case*. Evatt J said in *R v Hush; Ex parte Devanny*:[12]

> It is true that sec. 61 of the Constitution declares that the "executive" power of the Commonwealth extends to "the execution and maintenance of this Constitution, and of the laws of the Commonwealth." But this declaration, as was indicated in the *Wool Tops Case (The Commonwealth v. Colonial Combing, Spinning and Weaving Co.*), only defines the general limits of the King's executive authority in respect of the Commonwealth and does not determine what the Executive may lawfully do upon any given occasion. Whatever powers or duties are conferred or imposed upon the King's executive government, *by any section of the Constitution, or by such portion of the Royal prerogative as is applicable,* may lawfully be exercised; but sec. 61 itself gives no assistance in the ascertainment or definition of such powers and duties.

12 (1932) 48 CLR 487, 510-511 (emphasis added).

Whilst is it contestable as to what Evatt J meant by the phrase, "may lawfully be exercised" in the passage above, the better view is, it is suggested, that the source of the prerogative powers of the Crown is not s 61 of the Constitution, but the Crown's attributes which are recognised by the common law. His reference to s 61 giving "no assistance in the ascertainment or definition of such [prerogative] powers and duties" favours the conclusion that s 61 is *not* the textual source of the prerogative. Evatt J fortified this view eight years later in what might be described as his Honour's leading decision on the prerogative – *Commissioner of Taxation (Cth) v Official Liquidator of E.O. Farley Ltd (In Liq)* – where his Honour said:[13]

> By sec. 61 of the *Commonwealth Constitution*, the "executive power" of the Commonwealth became exercisable by the Governor-General as the Queen's representative. This section, however, does not determine whether any specific royal prerogative is exercisable by the Governor-General on the one hand or by the Governors of the several States on the other.

By "specific royal prerogative" Evatt J should be understood to have referred to the different species of prerogatives, like the power to declare war, or the right to royal metals. Evatt J is here referring to the structural tension between the Commonwealth and the States in terms of those prerogatives (usually in the form of preferences) which can be shared between the levels of government, like the right to royal metals. Evatt J's view was endorsed and slightly nuanced by Dixon J in *Richard Foreman & Sons Pty Ltd, Re; Uther v Commissioner of Taxation (Cth)*,[14] where the future Chief Justice observed in relation to a priority of the Commonwealth Crown:[15]

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13 (1940) 63 CLR 278, 319.

14 (1947) 74 CLR 508.

15 (1947) 74 CLR 508, 531.

> But the priority which the State Act, by s. 282, is supposed to have destroyed and, by s. 297 (1) (d) in the case of land and income tax, to have reduced, is a consequence of the King's prerogative. It is an adjunct of the "Executive power of the Commonwealth" that is vested by s. 61 of the Constitution in the Sovereign. The prerogative of the Crown representing the Commonwealth, being as extensive as in Great Britain, is part of the constitutional law of the Commonwealth: cp. *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*. The rule that when the title of the Crown and the title of a subject concur, that of the Crown is to be preferred, is a general rule of the common law of the Constitution.

Jacobs J's reasons in *Victoria v Commonwealth* (the *Australian Assistance Plan* case) also appear to reflect the view expressed by Isaacs J and Dixon J *supra*. Sir Kenneth said:[16]

> The Constitution envisages the exercise of the prerogative through the Governor-General in those matters appertaining to the Government of the Commonwealth in its provision by s. 61 that the executive power of the Commonwealth extends to the execution and maintenance of the Constitution. *Except so far as the Constitution makes particular provision in respect of matters otherwise within the prerogative, the prerogative remains unaffected.* It was always intended that, subject to the Constitution and its expression of the subject matters of Commonwealth power, to a large extent the prerogative would be exercised on all matters of Australian concern by the Crown on the advice of Australian Ministers rather than on the advice of United Kingdom Ministers. The extent of its exercise on such advice has throughout the years of federation been a growing extent.

16 (1975) 134 CLR 338, 405 (emphasis added).

Whilst there are many examples that can be identified where justices of the High Court have, or appear to have, expressed a view that the prerogatives of the Crown stem from the words of s 61 of the Constitution (and therefore, presumably, the prerogatives obtain their scope from those words), it is suggested that the views expressed by Sir Isaac Isaacs, Evatt J, Sir Owen Dixon and Sir Kenneth Jacobs above are correct statements of constitutional principle. The older authorities, identified *supra*, ought to be reembraced by the High Court of Australia.

The Emergence of the Orthodox View

The orthodox (and newer) view is the opposite of that which is outlined above. The orthodox view is that the prerogatives of the Crown are textually recognised and affirmed in the Constitution by virtue of the opening words of s 61 – that "the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative …".[17] In the *Communist Party Case*,[18] Williams J expressed a view that:[19]

> The executive power of the Commonwealth at the date of the Constitution presumably included such of the then existing prerogative powers of the King in England as were applicable to a body politic with limited powers.

The first modern authority that doesn't qualify this statement with the word "presumably", and articulates the now "well established"[20] view is Mason J, who in *Barton v Commonwealth* said that:[21]

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17 L Zines, "Commentary" in H V Evatt, *The Royal Prerogative,* C5.

18 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

19 (1951) 83 CLR 1, 231.

20 J Stellios, *Zines's The High Court and the Constitution*, 373.

> By s. 61 the executive power of the Commonwealth was vested in the Crown. It extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.

In *Pape*[22] the High Court was asked by the Commonwealth to uphold the appropriation of funds for the purposes of a national financial emergency on the basis that the payment was lawfully made within the exercise of the executive power of the Commonwealth. French CJ examined the textual history of s 61 of the Constitution in some detail, and concluded that:[23]

> It is not necessary for present purposes to consider the full extent of the powers and capacities of the Executive Government of the Commonwealth. Such powers as may be conferred upon the Executive by statutes made under the *Constitution* are plainly included. So too are those powers which are called the prerogatives of the Crown, for example the power to enter into treaties and to declare war. In addition, whatever the source, the Executive possesses what have been described as the "capacities" which may be possessed by persons other

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21 *Barton v Commonwealth* (1974) 131 CLR 477 at 498. French CJ approvingly quotes this passage in *Pape* (2009) 238 CLR 1, 61 [130]; French CJ also approvingly quotes in *Pape* at 62 [131] the words of Mason CJ, Deane and Gaudron JJ in *Davis v The Commonwealth* (1988) 166 CLR 79, 93, where their Honours said: "... s 61 confers on the Commonwealth all the prerogative powers of the Crown except those that are necessarily exercisable by the States under the allocation of responsibilities made by the Constitution and those denied by the Constitution itself".

22 (2009) 238 CLR 1.

23 (2009) 238 CLR 1, 60 [126] and [127] (footnotes omitted, emphasis added).

than the Crown.

> The collection of statutory and prerogative powers and non-prerogative capacities *form part of*, but do not complete, the executive power. They lie within the scope of s 61, which is informed by history and the common law relevant to the relationship between the Crown and the Parliament. That history and common law emerged from what might be called an organic evolution. Section 61 is an important element of a written constitution for the government of an independent nation. While history and the common law inform *its content*, it is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government. …

The High Court again affirmed that the prerogative is an aspect of the executive power of the Commonwealth. In *Cadia Holdings v State of New South Wales*,[24] the Chief Justice said:[25]

> Prerogative powers and rights enjoyed by the Crown in the colonies before Federation may be seen as informing, or forming part of, *the content* of the executive powers of the Commonwealth and the States according to their proper functions.

The plurality in *Cadia* said:[26]

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24 (2010) 242 CLR 195.

25 (2010) 242 CLR 195, 210 [30], see also [31] (French CJ) (emphasis added).

26 (2010) 242 CLR 195, 226 [86] (Gummow, Hayne, Heydon and Crennan JJ) (footnotes omitted); approvingly quoted by Gummow and Bell JJ in *Williams [No 1]* (2012) 248 CLR 156, 227 [123]. By "includes" Dixon J should not be understood as meaning that the prerogative are incorporated within s 61 of the Constitution; rather, the prerogative powers are "accorded the Crown by the common law".

> The executive power of the Commonwealth of which s 61 of the Constitution speaks enables the Commonwealth to undertake executive action appropriate to its position under the Constitution and to that end includes the prerogative powers accorded the Crown by the common law. Dixon J spoke of common law prerogatives of the Crown in England, specifically the prerogative respecting Crown debts, as having been "carried into the executive authority of the Commonwealth".

Three years after *Cadia*, French CJ, Crennan, Kiefel and Bell JJ affirmed that the prerogatives of the Crown are "now encompassed in the executive power conferred by s 61".[27]

Furthermore, it is worth noting (and is important in terms of the core argument advanced) that there is a division of opinion within the justices of the High Court as to the precise language used by the constitutional draftsmen to recognise the prerogative. Gummow, Crennan and Bell JJ opined in *Pape* that:[28]

> With that understanding, the phrase "maintenance of this Constitution" in s 61 imports more than a species of what is identified as "the prerogative" in constitutional theory. It conveys the idea of the protection of the body politic or nation of Australia.

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27 *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645, 636.

28 (2009) 238 CLR 1, 83 [215].

In contrast to Gummow, Crennan and Bell JJ's reliance upon the words "maintenance of this Constitution" in s 61 as being the textual device, French CJ said in *Williams [No 1]* that:[29]

> The mechanism for the incorporation of the prerogative into the executive power is found in the opening words of s 61 which vests the executive power of the Commonwealth in "the Queen". This has been described as a "shorthand prescription, or formula, for incorporating the prerogative – which is implicit in the legal concept of "the Queen" – in the Crown in right of the Commonwealth."

This division of opinion as to which aspect of the text within s 61 is used to recognise the prerogative becomes more important in subsequent chapters. But, for present purposes, whilst there is a division of opinion about the precise words in s 61 that effect the recognition of the prerogative, until *Williams [No 2]*, it appeared settled that the prerogative rights, preferences, capacities, and immunities found textual recognition *somewhere* within the language of s 61's vesting of the executive power of the Commonwealth in the Queen. *Williams [No 2]* opened the door to challenging that conclusion. More will be said in respect of *Williams [No 2]* in Chapter 7, suffice to say at this point the orthodox view is that s 61 textually recognises the prerogatives of the Crown in right of the Commonwealth.

More recently, in *CPCF v Minister for Immigration and Border Protection*, French CJ summarised his view that:[30]

> Any consideration of the non-statutory executive power must bear in mind its character as an element of the grant of executive power contained in s 61 of the

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29 (2012) 248 CLR 156, 185 [23], the Chief Justice quoted the words of Professor George Winterton, *The Parliament, the Executive and the Governor-General*, 50.

30 (2015) 255 CLR 514, 538 [42] (French CJ) (emphasis added).

> Commonwealth Constitution. The history of the prerogative powers in the United Kingdom informs consideration of *the content* of s 61, but should not be regarded as determinative. *The content* of the executive power may be said to extend to the prerogative powers, appropriate to the Commonwealth, accorded to the Crown by the common law.[31] It does not follow that the prerogative content comprehensively defines the limits of the aspects of executive power to which it relates.

Additionally, and returning to *Cadia Holdings*, whilst Gummow, Hayne, Heydon and Crennan JJ cited Dixon J as authority for the proposition that the "common law prerogatives of the Crown in England" have been recognised in the Constitution by being "carried into the executive authority of the Commonwealth",[32] it is respectfully argued that their Honours have incorrectly read the reasons of Dixon J in *Farley's case*. In *Farley's case*, Dixon J said:[33]

> … the executive power of the Commonwealth is vested in the Crown, which, of course, is as much the central element in the Constitution of the Commonwealth as in a unitary constitution. The United-States Government did not succeed to the sovereignty of the British Crown and therefore inherited none of its common-law powers or privileges. The reasons why the United-States Government has none but a statutory preference have no application to our Constitution: Cf., per *Story* J., *United States v. State Bank of North Carolina*. The Commonwealth Constitution, an enactment of the Imperial Parliament, took effect in a common-law system, and the nature and incidents of the authority of

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31 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 226 [86] (Gummow, Hayne, Heydon and Crennan JJ); see also *Williams [No 1]* (2012) 248 CLR 156, 227–228 [123] (Gummow and Bell JJ).

32 (2010) 242 CLR 195, 226.

33 (1940) 63 CLR 278, 303-304.

> the Crown in right of the Commonwealth are in many respects defined by the common law. The prerogative which gives Crown debts priority over those due to a subject is in this way carried into the executive authority of the Commonwealth.

The expression "carried into the executive authority" in *Cadia Holdings* needs to be read in context, and in line with what Dixon J said in the earlier sentences of the passage recited above (especially the second last sentence), as well as what Dixon J said in *Richard Foreman & Sons*.[34] The use by Gummow, Hayne, Heydon and Crennan JJ in *Cadia Holdings* of the expression "carried into the executive authority", misdescribes the way that Dixon J viewed the operation of the relevant constitutional principles.

Nonetheless, it is now the orthodox constitutional principle regarding the relationship between s 61 of the Constitution and the prerogatives of the Crown. It is this orthodox view that is challenged in this dissertation.

III THE TWO SCHOOLS OF THOUGHT

Having set out what appears to be a dichotomous relationship between the older view and the orthodox view as to how the Constitution textually recognises the prerogatives of the Crown, it is now helpful (and before setting out the core argument) to identify the two schools of thought concerning the construction of s 61 of the Constitution. As a consequence of the High Court's view that s 61 recognises, or "imports", the prerogative, it is necessary to understand in greater detail the frameworks which have developed, or are developing, in respect of the scope or ambit of s 61. In particular, attention needs to be given to "non-statutory executive power". By "non-statutory executive power", reference is being made to that type of executive power which does not rely upon the execution and maintenance of the laws of the Commonwealth. Non-statutory executive power refers to the executive power which is said to arise by operation of the authority to execute and

34 (1947) 74 CLR 508, 531.

maintain "this Constitution". The power is "non-statutory", as it does not rely upon the exercise of the legislative power of the Commonwealth as a condition precedent to the exercise of the executive power of the Commonwealth – that is, it does not rely upon the pre-existence of a statute.

As was pointed out in the preface, Chapter II is now "where the action is" in terms of current High Court jurisprudential activity. This is evident in the Court's recent determination of five cases that considered the operation of the executive power of the Commonwealth – the *Pape* decision, the *First School Chaplains' Case* and the *Second School Chaplains' Case* (being *Williams [No 1],* and *Williams [No 2]* respectively), the *CPCF* decision, and the *Plaintiff M68* decision. These five decisions dramatically advanced the jurisprudence in relation to Chapter II of the Constitution generally, and s 61 specifically. A consequence of these decisions is that academic literature that was current just a few years ago can now be quite out of date.

As Kiefel J recently highlighted, "the terms of s 61 do not offer much assistance in resolving questions as to the scope of executive power".[35] What is included within the expression "executive power" may be "described but not defined".[36] There is no internal definition of "executive power" within the text of the Constitution. The Court must look more broadly within the constitutional text, or outside the constitutional text, for guidance on construing the scope of the executive power.

The decisions of the High Court and the commentaries of leading constitutional scholars in Australia have resulted in the emergence of two broad schools of thought as to how the non-statutory executive power is to be understood. The first is the common law view. The common law view sees depth of the non-statutory executive power being ascertained, primarily, through reference to the traditional common law recognised authorities in Britain. The second is the inherent view. The inherent view sees the depth of the non-

35 *CPCF* (2015) 255 CLR 514, 595 [259] (Kiefel J).

36 *Wool Tops Case* (1922) 31 CLR 421, 440 (Isaacs J).

statutory executive power being ascertained by reference to qualities that are said to inhere in the executive government and the Commonwealth as a body politic.

The Common Law View

The common law view is that "the non-statutory aspect of s 61 can only be given sufficient meaning by reference to the Crown's prerogative powers".[37] The common law view sees the executive power of the Commonwealth construed, in large measure, by reference to the prerogatives of the Crown in British constitutional jurisprudence. The common law view is said to have been the "once orthodox position" as to how the "non-statutory executive power is to be construed".[38] Pursuant to this school of thought, in judicially reviewing executive action, a court focuses upon how the action taken has been historically accepted, or not accepted, as a power or function of the Crown *recognised by the common law*. This mode of analysis is primarily an historical one, whereas the inherent view is primarily determined (it would seem) in a mixed way – resorting to history, and also partially understood in a functionalist sense, having regard to the nation that was sought to be established by the framers.

In defence of the common law view, Black CJ cautioned in the *Tampa case* against seeing in s 61 "some larger source" of power than the traditional common law recognised powers of the Crown. Black CJ said:[39]

> It would be a very strange circumstance if the at best doubtful and historically long-unused power to exclude or expel should emerge in a strong modern form from s 61 of the constitution by virtue of general conceptions of 'the national interest'. This is all the more so when according to English constitutional theory new prerogative powers cannot be created.

37 N Condylis, "Debating the Ambit and Nature of the Commonwealth's Non-statutory Executive Power" (2015) 39(2) *Melbourne University Law Review*, 385, 387.

38 Ibid.

39 (2001) 110 FCR 491, 501.

Chief Justice Black's reasoning in the *Tampa case* is, perhaps, the last fulsome articulation of the common law view before the emergence of the dominant inherent view, which has been widely criticised by constitutional academics.

The Inherent View

The inherent (or "nationhood") view is often traced to the *Australian Assistance Plan case*, where Mason J said that the executive power extended to "enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation".[40] The inherent view gained momentum in the dicta of Gummow J, when, as a judge of the Federal Court, his Honour wrote that "[i]n Australia … one looks not to the content of the prerogative in Britain, but rather to s 61 of the Constitution, by which the executive power is vested".[41] Significant momentum occurred in the *Tampa case* where French J (then a member of the Full Court of the Federal Court) proposed an account of the relationship between the prerogatives of the Crown and the executive power of the Commonwealth which focused upon the structural considerations derived from the distribution of power between three arms of government. French J said:[42]

> [T]he Executive power of the Commonwealth under s 61 cannot be treated as a species of the royal prerogative … While the Executive power may derive some of its content by reference to the royal prerogative, it is a power conferred as part of a negotiated federal compact expressed in a written Constitution distributing powers between the three arms of government …

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40 (1975) 134 CLR 338, 397. The inherent view's doctrinal heritage can be traced back earlier than the *AAP case*.

41 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369.

42 *Ruddock v Vadarlis* (2001) 10 FCR 491, 540 (French and Beaumont JJ; Black CJ dissenting). Black CJ based his conclusions exclusively on the prerogative and did not agree with the recognition of an executive nationhood power beyond the prerogative. See S Evans, "The Rule of Law, Constitutionalism and the MV Tampa" (2002) 13 *Public Law Review* 94.

These developments culminated in *Pape*.[43] The case concerned the validity of aspects of the Commonwealth's fiscal stimulus package, developed in response to the Global Financial Crisis of 2008. The supporting legislation provided that an individual tax payer whose taxable income was below a certain threshold was entitled to a tax bonus in the form of a one-off cash payment. The inherent view went from obscure theory to the dominant school of thought when French J, by now the Chief Justice of the High Court, said:[44]

> The executive power of the Commonwealth conferred by s 61 of the Constitution extends to the power to expend public moneys for the purpose of avoiding or mitigating the large scale adverse effects of the circumstances affecting the national economy *disclosed on the facts of this case*, and which expenditure is on a scale and within a time-frame *peculiarly within the capacity of the national government*. … The aspect of the power engaged in this case involves the expenditure of money to support a short-term national fiscal stimulus strategy calculated to offset the adverse effects of a global financial crisis on the national economy.

Explaining the inherent view of s 61, the Chief Justice said in *Pape* that s 61:[45]

> … is an important element of a written constitution for the government of an independent nation. While history and the common law inform its content, it is not a locked display cabinet in a constitutional museum. It has to be capable of serving the proper purposes of a national government.

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43 (2009) 238 CLR 1.

44 (2009) 238 CLR 1, 23-24 (emphasis added).

45 (2009) 238 CLR 1, 60.

While Gummow, Crennan and Bell JJ generally concurred, they gave expression to a nationhood power in more expansive terms. Their Honours said that:[46]

> [T]he executive power of the Commonwealth enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the Constitution and having regard to the spheres of responsibility vested in it. … [Section] 61 imports more than a species of what is identified as 'the prerogative' in constitutional theory.

The inherent view is a "product of a more recent evolution in constitutional jurisprudence, crystallising in *Pape*".[47] The application of the inherent view to the two limbs of s 61 of the Constitution is not straight forward. In respect of the execution and maintenance of the laws of the Commonwealth, the inherent view "presents few interpretational difficulties, as recourse may be had to the constitutional or legislative provision which the Commonwealth is administering to measure the lawfulness of the impugned action".[48] The second limb – executing and maintaining "this Constitution" – is analytically problematic. Reviewing executive acts which are purportedly done to *maintain* the Constitution are conceptually more difficult, due to what Nicholas Condylis described as the "textual ambiguity".[49]

The white-hot issue in relation to the inherent view is: by what criterion, or criteria, does the court determine whether impugned executive action falls within the meaning of "execution and maintenance of this Constitution"?

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46 (2009) 238 CLR 1, 90.

47 N Aroney, et al, *The Constitution of the Commonwealth of Australia; History, Principle and Interpretation*, 451.

48 N Condylis, "Debating the Ambit and Nature of the Commonwealth's Non-statutory Executive Power" (2015) 39(2) *Melbourne University Law Review*, 385, 387; and see also *Brown v West* (1990) 169 CLR 202.

49 N Condylis, "Debating the Ambit and Nature of the Commonwealth's Non-statutory Executive Power" (2015) 39(2) *Melbourne University Law Review*, 385, 387.

Critics have drawn attention to the subjectivity inherent in such a conception of inherent executive power.[50] Reasonable minds are very likely to differ as to what may be permitted by such a power. Zines referred to French J's approach in *Tampa* as "highly subjective".[51]

It is one thing to explain s 61 by reference to its role in a federal political compact; it is quite another thing to determine its precise content. In certain respects, much of the implied power will overlap with the content of the more established executive prerogatives, especially those relating to foreign affairs and defence. But as the nationhood power is not determinable solely by reference to the legally discernible criteria of the common law, it is not at all clear how its outer bounds are to be determined even if the question is approached incrementally as cases come before the Court. That is not to say that the common law itself always provides clear answers. Rather, the point is that relying solely on "national" and "practical" considerations to determine the ambit of the maintenance component of s 61 is especially prone to subjective, policy-type considerations that are not ideally suited to judicial determination.

IV THE CORE ARGUMENT

The Common Law and the Constitution

The core argument advanced in this dissertation commences with the most basal of all constitutional principles. From Federation it has consistently been said that the Constitution "is not an isolated document"; "[i]t has been built on traditional foundations",

50 See S Evans, "The Rule of Law, Constitutionalism and the MV Tampa" (2002) 13 *Public Law Review* 94; S Evans, "Developments - Australia - *Ruddock v Vadarlis* (the Tampa Litigation)" (2003) 1 *International Journal of Constitutional Law* 123; E Wilheim "MV Tampa: the Australian Response" (2003) 15 *International Journal of Refugee Law* 159.

51 L Zines, "The inherent executive power of the Commonwealth", (2005) 16 *Public Law Review* 279, 292.

and its "roots penetrate deep into the past".[52] In 1947, the then Chief Justice of the High Court, Sir John Latham, said in *Richard Foreman & Sons* that:[53]

> The Commonwealth of Australia was not born into a vacuum. It came into existence within a system of law already established. To much of that law the Commonwealth is necessarily subject; for example, the Commonwealth has no general power to legislate with respect to the law of property, the law of contract, the law of tort. In relation to those subjects, speaking generally, it lives and moves and has its being within a system of law which consists of the common law (in the widest sense) and the statute law of the various States.

Sir John Latham's successor, Sir Owen Dixon expressed his extra-judicial view that the common law was "a jurisprudence antecedently existing into which our system came and in which it operates",[54] and that the "general law" was "the source of the legal conceptions that govern us in determining the effect of the written instrument"[55] of the Constitution. In *Lange v Australian Broadcasting Corporation,* all seven judges of the High Court opined

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52 J Quick, R R Garran, *The Annotated Constitution of the Australian Commonwealth*, vii; Andrew Inglis Clark said in his *Studies In Australian Constitutional Law*, at 5: "… in the case of the Constitution of the Commonwealth of Australia, the reproduction of portions of the historical and unwritten Constitution of the mother country in definite terms imports into Australian constitutional law under the Commonwealth many legal relations and consequences which have their origins in the English common law. The constitutional law of the mother country will therefore continue to be a guide and a fountain of knowledge and authority on many matters included in the constitutional law of Australia …".

53 *Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 521 (Latham CJ); see also *Theophanous v Herald Weekly Times Ltd* (1994) 182 CLR 104, 141 (Brennan J), where his Honour said that: "The Constitution and the common law are bound in a symbiotic relationship: though the Constitution itself and laws enacted under the powers it confers may abrogate or alter rules of the common law, the common law is the matrix in which the Constitution came into being … and which informs its text".

54 O Dixon, "The Common Law as an Ultimate Constitutional Foundation", *Jesting Pilate*, 204; G Hill, A Stone, "The Constitutionalisation of the Common Law" [2004] UMelbLRS 1; cf W M C Gummow, "The Constitution: Ultimate foundation of Australian law?", (2005) 79 ALJ 167.

55 O Dixon, "Marshall and the Australian Constitution", *Jesting Pilate*, 166, 174; see also, A Stone, "The Common Law And The Constitution: A Reply" (2002) 26(3) *Melbourne University Law Review* 646.

that "[t]he common law supplies elements of the British constitutional fabric".[56] Their Honours went on to approvingly quote in *Lange*[57] the following extra-judicial words of Sir Owen Dixon:[58]

> We do not of course treat the common law as a transcendental body of legal doctrine, but we do treat it as antecedent in operation to the constitutional instruments which first divided Australia into separate colonies and then united her in a federal Commonwealth. We therefore regard Australian law as a unit. Its content comprises besides legislation the general common law which it is the duty of the courts to ascertain as best they may. ... The anterior operation of the common law in Australia is not just a dogma of our legal system, an abstraction of our constitutional reasoning. It is a fact of legal history.

In the canonical decision of *Amalgamated Society of Engineers v Adelaide Steamship Co*, Sir Adrian Knox, Sir Isaac Isaacs, Sir George Rich and Sir Hayden Starke observed that the Constitution should be "read … naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it".[59] More recently, French CJ said in *Momcilovic v The Queen* that:[60]

> The common law in its application to the interpretation of statutes helps to define the boundaries between the judicial and legislative functions. That is a reflection of its character as "the ultimate constitutional foundation in

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56 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

57 (1997) 189 CLR 520, 564.

58 O Dixon, "Sources of Legal Authority", *Jesting Pilate*, 198, 199-200.

59 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152.

60 (2011) 245 CLR 1, 46 [42].

> Australia".[61] It also underpins the attribution of legislative intention on the basis that legislative power in Australia, as in the United Kingdom, is exercised in the setting of a "liberal democracy founded on the principles and traditions of the common law".[62]

As Abraham and Sarah begat Isaac, the common law and the Imperial Parliament begat the Constitution Act. The common law is both a source of substantive principles that inform the operation of the Constitution, and an aid in its interpretation. For example, in *Cheatle v The Queen*,[63] the High Court reaffirmed that "[i]t is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history".[64] The common law of the British Constitution remains relevant to the content and construction of the text, structure and history of the Australian Constitution.[65]

The Constitution and the Crown

Preambles have interpretative power.[66] From the opening words of the *Commonwealth of Australia Constitution Act 1900*, the Imperial Act textually affirms the continued operation of the common law of the Crown.[67] The preamble proclaims that "[w]hereas the people" of the six colonies "have agreed to unite in one indissoluble Federal Commonwealth *under*

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61 *Wik Peoples v Queensland* (1996) 187 CLR 1, 182 (Gummow J).

62 *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587 (Lord Steyn).

63 (1993) 177 CLR 541.

64 (1993) 177 CLR 541, 552.

65 *Brownlee v The Queen* (2001) 207 CLR 278, 285 (Gleeson CJ and McHugh J); J Goldsworthy, "The Constitution and its common law background", (2014) 25 *Public Law Review* 265, 274.

66 J Quick, R R Garran, *The Annotated Constitution of the Australian Commonwealth*, said at 284 (and quoting Lord Thring from his *Practical Legislation; on the Composition and Language of Acts of Parliament*, 1877, 36) that: "The proper function of a preamble is to explain and recite certain facts which are necessary to be explained and recited, before the enactments contained in an Act of Parliament can be understood".

67 H V Evatt, *The Royal Prerogative*, 7.

the Crown of the United Kingdom of Great Britain and Ireland, *and* under the Constitution hereby established". As Berriedale Keith said of the reference to the Crown in the preamble, the Crown is "the foundation of the Constitution".[68]

The entity described as the "Federal Commonwealth" is the constitutional polity or compact created, subject to "the Crown" and "the Constitution hereby established". The text of the Constitution Act points to two fountains of constitutional authority in the Commonwealth; "the Crown" and "the Constitution". Quick and Garran described "the Commonwealth" as being "under a double subjection".[69] Indeed, one could go as far as to say that *the first very principle* of Australian constitutional law is that Federal Commonwealth is a creature of the Crown and of the Imperial Parliament's written constitution. All other constitutional assumptions flow from this first principle. This is not to suggest that the principle in *Attorney-General v Marquet* is wrong.[70] Constitutional norms (such as the Crown) are "now to be traced to Australian sources";[71] this appears to mean that the Crown is the Australian Crown, textually recognised in both the Constitution Act and by the common law in Australia.[72]

The words "under the Crown" were borrowed from the *British North America Act 1867*,[73] and are "a concrete and unequivocal acknowledgement of a principle which pervades the whole system of Government".[74] Sir Zelman Cowen pointed to the establishment of a "federal union under the Crown" as central to the understanding of the

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68 A Berriedale Keith, *Responsible Government in the Dominions*, Vol II, 1912, 689. Professor Berridale Keith said, at 608, that as to the Constitution's interpretation, "the constitution itself gives little direct guidance", but that "[I]t provides indeed, in the preamble, an assertion of the purpose of the colonies to unite in one indissoluble federal Commonwealth under the Crown of Great Britain and Ireland …".

69 J Quick, R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 300.

70 (2003) 217 CLR 545.

71 (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

72 *Judiciary Act 1903* (Cth), s 80.

73 The words "under the Crown" in the preamble of the *British North America Act 1867* are "a fundamental condition on which Canadian executive, legislative and judicial authority exists", said W P M Kennedy, in *The Constitution of Canada; An Introduction to its Development and Law*, 448.

74 J Quick, R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 294.

constitutional compact.[75] Sir William Harrison Moore said of the words "under the Crown" that:[76]

> The recital in the preamble is no mere expression of loyalty, but a statement of fact to which the most important legal incidents attach. The Crown establishes the Commonwealth, is a part of the Federal Parliament, is the depositary of the executive power of the Commonwealth, and retains the power (subject to limitations to be considered) of entertaining appeals in Council. So much is provided in the Act itself; but the Act does not exhaust the relations of the Crown to the Commonwealth. The prerogative runs there as in other dominions of the Crown …

The preamble of the Constitution Act is not the only textual affirmation of the subjection of the Constitution to the Crown. Section 44(iv) of the Constitution provides that any person who "holds any office of profit under the Crown …" shall be incapable of being chosen or of sitting as a senator or as a member of the House of Representatives. In this section of the Constitution we see the constitutional text presupposing the continued existence of the Crown, and therefore the law of the Crown.

There are two further textual affirmations. The first is s 2 of the Constitution, which permits the Queen to delegate "subject this this Constitution", the "powers and functions of the Queen" to the Governor-General. Inglis Clark said that s 2 introduced "into the Constitution of the Commonwealth that portion of the common law which invests the Crown with its prerogative rights and powers, and such portion of the common law is therefore part of the law of the Commonwealth".[77] Although, the better view is that s 2

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75 Z Cowen, "The Crown and Its Representative in the Commonwealth" (1992) *Commonwealth Law Bulletin* 304; similarly, Barwick CJ in the *First Payroll Tax Case* describes the Commonwealth "as a statutory Constitution under the Crown": *Victoria v Commonwealth* (1971) 122 CLR 353, 370.

76 W Harrison Moore, *The Constitution of the Commonwealth of Australia*, 73.

77 A Inglis Clark, *Studies In Australian Constitutional Law*, 190 and 206.

merely authorises the Queen to delegate, subject to the remaining provisions of the Constitution, those "powers and functions" to the governor-general.

The second further affirmation is s 74 of the Constitution which provides both a textual limitation upon the prerogative right of the Queen to entertain appeals from the Queen's dominions,[78] and an affirmation that "[e]xcept as provided in this section", the Constitution shall not impair any right which the Queen has, and is pleased to exercise "by virtue of Her Royal prerogative" to grant special leave of appeal from the High Court to Her Majesty in Council. This provision is a modification of the Crown's prerogative right to hear appeals from colonial courts.[79] The reference to "Her Royal prerogative" in the text of s 74 is an express affirmation that the prerogatives of the Crown are recognised and affirmed in the constitutional compact, and that the machinery of the Constitution is impliedly intended to operate with the common law of the Crown operating in the background. Or, using Sir Owen Dixon's words, is "antecedent in operation".

The centrality of the idea that the constitutional compact was crafted so as to be "under the Crown" can be historically traced to the Australasian Federation Conference, held in Melbourne in 1890, where the delegates resolved – as the very first resolution – that "the best interests of the present and future prosperity of the Australian Colonies will be promoted by an early union under the Crown …".[80]

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78 *Falkland Islands Co v The Queen* (1863) 1 Moo PC NS 312, where Lord Kingsdown said for the Board, "The Queen has authority, by virtue of her prerogative, to review the decision of all colonial courts, whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority".

79 *Théberge v Laudry* (1876) 2 App Cas 102 (Earl Cairns LC); *Johnston v Minister and Trustees of St Andrews Church, Montreal* (1877) 3 App Cas 159 (Earl Cairns LC); *Cushing v Dipuy* (1880) 5 App Cas 409 (Sir Montague Smith); *British Coal Corporation v The King* [1935] AC 500, 510-523 (Viscount Sankey LC), where the Lord Chancellor described, at 511, the discretion to grant special leave to appeal as "a residuum of the Royal prerogative of the sovereign". The Board expressly compared s 74 of the Australian Constitution to the equivalent provision in the *British North America Act 1867*.

80 *Con. Deb. Melb, 1890*, xxi-xxii. This resolution, and the subsequent drafting history that flows from it, is a further reason why the principle that the Federal Commonwealth is a creature of the Crown and the written constitution is *the first principle* of Australian constitutional law.

We see an affirmation of the fundamental nature of the (British) Crown as a feature of Australian constitutional jurisprudence which is antecedent to the compact between the Australian colonies, and "[p]ervading the [constitutional] instrument", in the reasoning of the plurality in the *Engineers' case*.[81] We also see an affirmation of the relationship between the Crown and constitution of a dominion in the Privy Council's reasoning in *Bonanza Creek Gold Mining Company Ltd v The King*.[82] In *Bonanza Creek*, the Board reasoned, in the context of the *British North America Act*, that "subject to certain express provisions in that Act and to the supreme authority of the Sovereign, who delegates to the Governor-General and through his instrumentality to the Lieutenant Governors the exercise of the prerogative on terms defined in their commissions", the distribution of executive authority follows the distribution of legislative powers.[83] The Board's reasoning was premised upon the principle that the Crown continued to inhere within it the prerogative, and the prerogative was only modified or displaced to the extent that the constitutional text modified or displaced the operation of that inherent feature of the Crown. Whilst noting that the *British North America Act* did not contain an equivalent provision to s 61 of the Australian Constitution, the Board nevertheless abstained from considering what the effect was of such a provision upon the principle just identified.[84]

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81 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 146-177, where Knox CJ, Isaacs, Rich and Starke JJ wrote: "For the proper construction of the Australian Constitution it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and, notwithstanding considerable similarity of structural design, including the depositary of the residual powers, radically distinguish it from the American Constitution. Pervading the instrument, they must be taken into account in determining the meaning of its language. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government. The combined effect of these features is that the expression "State" and the expression "Commonwealth" comprehend both the strictly legal conception of the King in right of a designated territory, and the people of that territory considered as a political organism".

82 [1916] AC 566 (consisting of Lord Buckmaster LC, Viscount Haldane, Lord Parker and Lord Sumner).

83 [1916] AC 566, 580.

84 [1916] AC 566, 586.

What then is "the Crown"? After reciting the various historical uses of the expression "the Crown" in *Sue v Hill*,[85] Gleeson CJ, Gummow and Hayne JJ concluded that:[86]

> The phrases "under the Crown" in the preamble to the Constitution Act and "heirs and successors in the sovereignty of the United Kingdom" in covering cl 2 involve the use of the expression "the Crown" and cognate terms in what is the fifth sense. This identifies the term "the Queen" used in the provisions of the Constitution itself, to which we have referred, as the person occupying the hereditary office of Sovereign of the United Kingdom under rules of succession established in the United Kingdom.

This sense in which the expression "the Crown" is used accords with the meaning attributed to the expression by the Imperial *Interpretation Act 1889,* which was in force, both at the time of the drafting of the Constitution Act by the Conventions, and at the time of the enactment of the Constitution Act by the Imperial Parliament.[87] Pointing to this statutory rule of interpretation, Sir William Wade concluded that "the Crown" is, "[i]n truth … simply the Queen".[88] Quick and Garran said that the Crown, "is a term which in English law is usually used as an impersonal or abstract description of the occupant of the throne".[89]

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85 *Sue v Hill* (1999) 199 CLR 462.

86 *Sue v Hill* (1999) 199 CLR 462, 502 [93].

87 Section 30 of *The Interpretation Act 1889* (Imp), provided that: "In this Act and in every Act, whether passed before or after the commencement of this Act, references to the Sovereign reigning at the time of the passing of the Act *or to the Crown* shall, unless the contrary intention appears, be construed as references to the Sovereign for the time being, and this Act shall be binding on the Crown", (emphasis added). The section was amended by the *Interpretation Act 1978*, by omitting the words "or to the Crown".

88 H W R Wade, "The Crown, Ministers and Officials: Legal Status and Liability", in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis*, 24.

89 J Quick, R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 321.

Gleeson CJ, Gummow and Hayne JJ in *Sue v Hill* made it clear that reference to "the Queen" and "the Commonwealth" in s 122 of the Constitution "indicates within the structure of the Constitution itself a recognition of the Crown in distinct bodies politic",[90] and therefore, this author argues that the Crown should be understood as something other than the Commonwealth in its legislative, executive or judicial capacities.

Furthermore, the Constitution Act is proclaimed to be "enacted by the Queen's most Excellent Majesty, by and with the advice and consent" of the Lords and Commons; the two houses of the British Parliament. This is a classical statement of constitutional principle; it is the Crown that enacts laws "by and with the advice and consent of" the Parliament at Westminster.[91] The presence of this assertion in the preamble affirms the principle that the Constitution was born of the common law, and that the legal authority for the establishment of the Commonwealth at the time of federation came from the Crown, acting within its common law right to "enact" legislation with the "advice and consent" of the Imperial Parliament. As the majority said in the *Engineers' case* at a time before the demise of the doctrine of the unity of the Crown:[92]

> The Constitution was established by the Imperial Act 63 & 64 Vict. c. 12. The Act recited the agreement of the people of the various colonies, as they then were, "to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established." "The Crown," as that recital recognizes, is one and indivisible throughout the Empire. Elementary as that statement appears, it is essential to recall it, because its truth and its force have been overlooked, not

90 *Sue v Hill* (1999) 199 CLR 462, 497 [81].

91 *The Prince's Case* (1606) 8 Co Rep 1A, 77 ER 481 (Coke LCJ); *R (Jackson & Ors) Attorney-General* [2006] 1 AC 262, 306 (Lord Hope).

92 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152-153 (Knox CJ, Isaacs, Rich and Starke JJ). Each of these passages has been expressly affirmed by Barwick CJ in *State of Victoria v The Commonwealth* (1970) 122 CLR 353; in the case of the first quoted passage, at 366-367, in the case of the second quoted passage, at 370-371.

> merely during the argument of this case, but also on previous occasions. …
>
> … Though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality, in accordance with the common law, or the statute law there binding the Crown …
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> … The Act 63 & 64 Vict. c. 12, establishing the Federal Constitution of Australia, being passed by the Imperial Parliament for the express purpose of regulating the royal exercise of legislative, executive and judicial power throughout Australia, is by its own inherent force binding on the Crown to the extent of its operation.

Whilst the Constitution Act binds the Crown, the Crown, and the "special body of law having grown up around it"[93] which might be described as the common law of the Crown, are basal to any analysis of the content and construction of the Australian Constitution – and understanding its text, structure and history. In the words of Leslie Zines, "the Commonwealth was born into a common law world where rules existed as to the powers and legal position of the Crown, which the Commonwealth inherited as a government of the Queen".[94]

A further textual point ought to be made. The Constitution's text differentiates the senses in which the Queen, the Governor-General (acting pursuant to text of the Constitution), and the Governor-General (acting pursuant to a delegated authority on behalf of the Queen) have their powers and functions vested in them. The text of the

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93 M Loughlin, "The State, the Crown and the Law", in M Sunkin, S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis*, 35, and citing R Anson's *The Law and Custom of the Constitution, Vol II The Crown* [1886], (Fourth Edition by A B Keith, 1935); and A B Keith's *The King and the Imperial Crown.*

94 L Zines, "The inherent executive power of the Commonwealth" (2005) 16 *Public Law Review* 279, 280.

Constitution expressly identifies the existence of some powers and functions vested in the Queen in her Royal person (for example, ss 2, 58, 59 and 60). The text of the Constitution identifies powers and functions of the Governor-General which are exercised *on the Queen's behalf* (for example, ss 2, 58 and 61). And the Constitution establishes original grants of power or functions to the Governor-General (for example, ss 58, 63, 64, 83 and 126). Therefore, some of the Governor-General's powers and functions are *not* an assignment of the Sovereign's powers and functions – but flow directly from the text of the Constitution. Each of these three different forms of expressing regal or vice-regal authority in the Constitution support the proposition that there are some powers and functions of the Queen (that Her Majesty retains in her Australian dominion after the enactment of the Constitution Act) that have not been expressly delegated to the Governor-General, or appropriated to the Governor-General as original grants of constitutional authority. The Constitution is not a complete code of royal authority.

The Crown's common law rights, preferences and capacities

Sir Samuel Griffith said in 1915:[95]

> It is clear law that in the case of British Colonies acquired by settlement the colonists carry their law with them so far as it is applicable to the altered conditions. In the case of the eastern Colonies of Australia this general rule was supplemented by the Act 9 Geo. IV., c. 83. The laws so brought to Australia undoubtedly included all the common law relating to the rights and prerogatives of the Sovereign in his capacity of head of the Realm and the protection of his officers in enforcing them, including so much of the common law as imposed loss of life or liberty for infraction of it.

95 *R v Kidman & Ors* (1915) 20 CLR 425, 435.

The first Chief Justice continued: "When in 1901 the Australian Commonwealth was formed, this law continued to be the law applicable to the rights and prerogatives of the Sovereign as head of the States as before, subject to any such local repeal".[96]

The Crown, and the common law rights, capacities, preferences and immunities of the Crown, pre-date the Constitution, and the expressed recognition and continuance of the Crown within the constitutional framework of the Commonwealth, means that the prerogatives of the Crown are textually recognised as emanating from their pre-existing source – the Crown – and recognised by the operation of the common law.

The Constitution establishes a new framework for the vesting and exercising of the powers described as "legislative", "executive" and "judicial" powers *of the Commonwealth*; that is, of the powers established by, or flowing from, the new Constitution. The pre-existing common law relating to the Crown remains unaffected unless expressly or impliedly affected or modified by the words of the new Constitution.

The Constitution vests the executive power of the Commonwealth in the Queen. The executive power *of the Commonwealth* ought to be understood as the common law executive power, as amended or modified by the express and implied requirements of the Constitution – principally the modifications effected by Chapter II of the Constitution.[97]

That is, the executive power of the Commonwealth is the power to execute or maintain (that is, administer)[98] the Acts of the Parliament, or the common law rights, preferences, capacities or immunities of the Crown in right of the Commonwealth. The executive power of the Commonwealth is not the source of the common law rights, preferences, capacities or immunities; merely the power to execute or maintain those rights, preferences,

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96 (1915) 20 CLR 425, 435.

97 Cf, *Williams [No 2]* (2014) 252 CLR 416, 467 [76], [77], and [79].

98 A Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of the Commonwealth", in P Brazil & B Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia with opinions of Solicitors-General and the Attorney-General's Department,* Vol I, 131.

capacities or immunities. The affirmation of those prerogatives must be found in some place other than the opening words of s 61 of the Constitution.

The Queen's Ministers of State for the Commonwealth

The inclusion in section 64 of the Constitution of the words "… and shall be the Queen's Ministers of State for the Commonwealth" recognises and affirms within the constitutional text the common law rights, preferences, capacities and immunities of the Crown – with those prerogatives being the common law rights, preferences, capacities and immunities of the Crown suitable for the exercise by the Queen's Ministers of State for the Commonwealth.[99]

In this way, Dixon J was correct in *Richard Foreman & Sons*; the prerogatives of the Crown are "an adjunct of the 'Executive power of the Commonwealth' that is vested by s 61 of the Constitution in the Sovereign",[100] that is, they are incorporated or sourced from "the common law of the Constitution",[101] and are, as "an adjunct" of the executive power, executed and maintained (or administered) by the executive government of the Commonwealth. As an adjunct of the executive power, the prerogatives are something added to the executive power, but are not an essential part of it.

Section 61 does not, *of itself*, incorporate the prerogatives of the Crown. Section 61 merely confirms the continued investment of the executive power in the Queen (and making it exercisable by the governor-general) – that is, the power to execute, maintain or administer – in the Queen (and the governor-general). The rights, preferences, capacities and immunities of the Crown (that is, centuries old attributes of the Crown), are recognised by the common law and are executed or administered pursuant to the power vested by s 61; the continued presence and operation of those rights, preferences, capacities and immunities is recognised by the common law, and is affirmed by the textual recognition in

99 Ibid. Attorney-General Deakin uses the expression "The King's Ministers of State for the Commonwealth" in the *Vondel* opinion, as Edward VII was then the reigning Sovereign.

100 (1947) 74 CLR 508, 531.

101 (1947) 74 CLR 508, 531.

the "Queen's Ministers of State for the Commonwealth" affirmation in s 64, and also by the references to the "powers and functions of the Queen" in s 2 and "Her Royal prerogative" in s 74 of the Constitution.

Section 61 speaks of *a power*, being the executive power of the Commonwealth; the section does not expressly or impliedly refer to the preferences, capacities or immunities (and, arguably, "rights" are different to a "power").[102] Textually, the section cannot be stretched beyond the linguistics of the outer limits of the word "power". For the text of the Constitution to incorporate a recognition of continuing preferences or immunities (and rights), then another provision, or a part of a provision, needs to do this work – and that is the purpose of the addition of the affirming words that the ministers of state, appointed pursuant to section 64 of the Constitution are to be "the Queen's Ministers of State for the Commonwealth". As argued in Chapter 4, the implied purpose of this text goes beyond recognition of a positive power – to the characteristics of the Crown, and the Queen's Ministers of State. That is, the "apparently innocuous words" in s 64 textually affirm the fullness of the prerogatives of the Crown as continuing to be vested in the Queen, and available to be delegated by s 2 of the Constitution, or exercised by s 61 of the Constitution. Dr John Waugh is apposite:[103]

> … for lawyers of the 1890s what we see as questions of the scope of executive power were questions of delegation from the Crown. In that sense, it was more natural that some in the Convention would think of the chain of delegation to ministers, rather than the abstract definition of the matters that came within the executive power of the Commonwealth, when they tried to ensure that the Commonwealth had particular capacities.

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102 See Chapter 6.

103 J Waugh, "Lawyers, Historians and Federation History", in R French, G Lindell and C Saunders (eds), *Reflections on the Australian Constitution*, 30.

V THE EXECUTIVE POWER OF THE COMMONWEALTH

It is not the primary purpose of this dissertation to advance a theory in relation to the metes or bounds of the executive power of the Commonwealth. What has sought to be done is describe the relationship between the prerogatives of the Crown and the executive power of the Commonwealth, and this has been done by correctly placing the prerogative within the text, structure and history of the Constitution. Having done this, it becomes possible to reflect upon the nature of the executive power more broadly. If it is accepted that the prerogative is a constitutionally-affirmed set of attributes of the Crown, recognised by the common law, and executed or maintained by operation of the executive power, the question then becomes: what constitutional work, other than executing and maintaining the prerogatives, does s 61 of the Constitution do?

The General Character of the Executive Power of the Commonwealth

Detached from the prerogative, the executive power of the Commonwealth is, and should be able to be construed as a species of power, defined in a functionalist sense, and in contradistinction to the legislative and judicial power.[104] The executive power is able to be construed in "the contrasted sense".[105] The executive power of the Commonwealth "extends to" the "execution and maintenance" of the Constitution, and of the laws of the Commonwealth. The power is *a power*; it is not a preference, capacity or immunity. It is not a constitutional quality (as the prerogative is), but a power. The executive government must look outside the language of s 61 to locate recognition of any preferences, capacities or immunities that are vested in the Queen, and the Queen's ministers and other officers.

Textually, the executive power has two aspects: the "execution and maintenance of this Constitution"; and the "execution and maintenance … of the laws of the Commonwealth". The later aspect is the statutory executive power as it applies to the Acts of the Parliament

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104 *Williams [No 2]* (2014) 252 CLR 416, 467-468 [78]; *R v Kidman* (1915) 20 CLR 425, 438 (Griffith CJ), and 440 (Isaacs J).

105 *New South Wales v Commonwealth* (1915) 20 CL5 54, 89 (Isaacs J).

of the Commonwealth, and delegated legislation. The former aspect is the non-statutory executive power as it applies to the provisions and rules of "this Constitution", and not the statutes of the Parliament of the Commonwealth.

Both the statutory and non-statutory executive powers are functional in nature. They take their character from being expressed powers; expressed in contradistinction to one another, and in a written constitution that distributes each of the powers to a separate constitutional actor. Whilst each of the legislative, executive and judicial powers is a function that was recognised in the tradition of the common law, they are modelled on the expression of those powers in the *United States Constitution*. They are modelled primarily on the functionalist distribution of legislative, executive and judicial functions and powers in the American instrument. The text, structure, and drafting history of each of the powers, traceable as they are to Andrew Inglis Clark's first draft in 1891, leads to the conclusion the executive power (and the legislative and judicial powers) ought to be first and foremost defined or described in a functionalist sense. As the leading admirer of the American instrument at the First Convention, Inglis Clark's initial draft (which was the frame that Griffith used to prepare his first draft) was very much modelled on the *United States' Constitution* – both in text and structure. Inglis Clark wrote in his *Studies* that:[106]

> [The judiciary] cannot interpose until the exercise of its authority is invoked by litigation, and its decisions, are confined to the determination of the rights and liabilities of the parties to the litigation, and the rights and liabilities of all other persons who could invoke its interposition by litigation of a like nature. Moreover the enforcement of its decisions is the duty of the depositaries of the executive power, and hence the strength of the judiciary is dependent upon the confidence in its impartiality, integrity, and ability which its judgments create in the public mind and in the executive and legislative departments of the

106 A Inglis Clark, *Studies in Australian Constitutional Law*, 25.

Government.

Under the heading "Distribution of Governmental Powers" in his *Studies*, Inglis Clark wrote that:[107]

> … by vesting the three powers separately in the Crown, the Parliament and the Federal Judiciary, without any further descriptions of the three powers than such as are contained in the three words "legislative," "executive," and "judicial," the Constitution necessarily indicates that the ambit of each power shall be determined by the essential and intrinsic meaning of the single descriptive word applied to it. The legislative power conferred by the Constitution upon the Parliament of the Commonwealth is therefore clearly a power *to make* laws: and the executive power which the Constitution declares to be vested in the Crown is the power *to execute*, that is to enforce, the laws of the Commonwealth.

Again, Inglis Clark ascribed a functionalist meaning to the executive power of the Commonwealth when he went on to write:[108]

> It is evident that the legislative power of the Commonwealth must be exercised by the Parliament of the Commonwealth before the executive or the judicial power of the Commonwealth can be exercised by the Crown or the Federal Judiciary respectively, because the executive and the judicial powers cannot operate until a law is in existence for enforcement or exposition.

As a consequence, as Isaacs J said, "[t]he Executive cannot change or add to the law; it can only execute it",[109] or, in the words of Barton J, the executive government is to "enforce

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107 Ibid 37 (original emphasis).

108 Ibid 38.

and uphold the laws".[110] The executive power of the Commonwealth cannot contain within itself a power to change or add to the law, otherwise the executive power ceases to be characterised as a power to execute or maintain. That is why the prerogative ought be described as, to use the description of Dixon J, "an adjunct of the 'Executive power of the Commonwealth' that is vested by s 61 of the Constitution in the Sovereign",[111] because the prerogative right, preference, capacity or immunity is recognised by the common law of the Crown and the particular right, preference, capacity or immunity is connected to, or added to (like an adjunct), the executive power which is the constitutional authority to undertake executive action to give the particular prerogative effect. Dixon J's adjunct description sits comfortably with the statement of Isaacs J in *Le Mesurier v Connor* that the executive power is a "generic term", and its "specific limits have to be determined *aliunde*".[112] The executive power of the Commonwealth permits the Queen and the Governor-General to execute and maintain "*this* Constitution",[113] and the laws of the Commonwealth. As Starke J said in the *Wool Tops case*, s 61:[114]

> … simply marks out the field of the executive power of the Commonwealth, and the validity of any particular act within that field must be determined by reference to the Constitution or the laws of the Commonwealth, or to the prerogative or inherent powers of the King.

Importantly, the preamble, and ss 2 and 64 of the Constitution are part of "*this* Constitution"; therefore, the execution and maintenance of the rights, preferences,

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109 *R v Kidman & Ors* (1915) 20 CLR 425, 441 (Isaacs J).

110 *New South Wales v Commonwealth* (1915) 20 CLR 54, 72 (Barton J).

111 *Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 531. In this sense, "adjunct" is used as an adjective and therefore means "connected or added to something".

112 *Le Mesurier v Connor* (1929) 42 CLR 481, 514.

113 J B Harper, "The Crown as the Source of Legal Powers in Australia", (1935-1938) 1 *Res Judicatae* 310.

114 (1922) 31 CLR 421, 461.

capacities, and immunities expressly and impliedly provided for in those two provisions is permitted to be done by the Queen and the Governor-General. Again, Evatt J in *R v Hush; Ex parte Devanny* said:[115]

> [Section 61 of the Constitution] only defines the general limits of the King's executive authority in respect of the Commonwealth and does not determine what the Executive may lawfully do upon any given occasion. Whatever powers or duties are conferred or imposed upon the King's executive government, by any section of the Constitution, or by such portion of the Royal prerogative as is applicable, may lawfully be exercised; but sec. 61 itself gives no assistance in the ascertainment or definition of such powers and duties.

This understanding of the way the executive power of the Commonwealth operates is consistent with the reasoning in *Williams [No 1]* and *Williams [No 2]*, in that the executive power is not a power which is *legislative in character* (being a source of lawmaking authority) and exercisable by the Crown – in the sense of being the power that can be invoked and then relied upon for the subsequent invocation of the incidental power. It is consistent with the principle of responsible government that the executive power is not construed as a primary authorisation, permitting subsequent execution and maintenance – it *is* the power to execute and maintain, and therefore relies upon the (actual or potential) invocation of a legislative power, or an inherent attribute of the Crown. That is not to say that the incidental power is not a legislative power; rather, the incidental power on its own is of such a character as to necessitate to reliance upon either another head of legislative power, or a narrow reading of what is said to be incidental. This reasoning is consistent with the warning given by Kiefel J in *Williams [No 1],* where her Honour said:[116]

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115 (1932) 48 CLR 487, 510-511 (emphasis added).

116 *Williams [No 1]* (2102) 248 CLR 156, 370 [581] (Kiefel J).

> Considerations as to the supremacy of Parliament which underlie the doctrine of responsible government may provide a basis for limiting executive power to certain of the legislative heads of power. As was pointed out by the plaintiff and the Solicitor-General of Queensland in argument, if the Executive's power to spend was unlimited, s 51(xxxix) [of the Constitution], when used to support the executive power, might operate to extend that power beyond those matters which may, expressly or impliedly, be otherwise the subject of legislative power. In that event the relationship between the Executive and the Parliament and the dominant position of the Parliament may be altered. Such an extension of power may enable the Commonwealth to encroach upon areas of State operation and thereby affect the distribution of powers as between the Commonwealth and the States.

This reasoning necessitates a construction of the executive power as a functionalist power, which should not be construed so as to permit the executive government of the Commonwealth to effectively legislate on the basis of the use of the executive power, and without the necessary reliance upon a head of legislative authority. This reasoning lends itself well to the description of Dixon J that the prerogative is "an adjunct" of the executive power of the Commonwealth.[117]

The framers had before them one cardinal text that was referred to by the delegates throughout the Federation Conventions. James Bryce's *The American Commonwealth* was then recently published, and influential to the framers in two respects. First, influenced by Bryce (and directly via Inglis Clarke) the structure of the written constitution was modelled on the American instrument. Second, again influenced by Bryce, some of the text (for example, the opening words of ss 1, 61 and 71 of the Australian Constitution) was modelled upon the corresponding provisions in the American instrument. In that the

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117 *Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 531.

framers copied the structure and some of the text of the American instrument; Lord Bryce's explanation about the relationship between the legislature, executive and judiciary was at the framers' fingertips:[118]

> … the national legislature has the right to legislate, the national executive to enforce the Federal laws and generally to act in defence of national interest, the national judiciary to adjudicate. All other legislation and administration is left to the several States, without power of interference by the Federal legislature or Federal executive.

Given the canonical status that *The American Commonwealth* had during the Federation Conventions, Lord Bryce's description of the legislative, executive and judicial departments in purely functionalist terms is weighty reason for concluding that each of the legislative, executive and judicial powers should (except where the constitutional text requires otherwise) be primarily described functionally.

What is to be made of the use of the words, "extends to" in s 61? In its natural and ordinary meaning, these words denote that the executive power consists of something else, but *extends to* the matter or matters that it is stretched to include. In this case, the execution and maintenance of the Constitution and the laws of the Commonwealth.

If the executive power of the Commonwealth is functionalist in nature; it is best described when contrasted against the legislative and judicial powers of the Commonwealth. The executive power, of necessity, relies upon the (actual or potential) exercise of the legislative and judicial powers of the Commonwealth. The difficulty is, in its pure form, an executive power (that is, a power to execute, administer or complete) interacts with the legislative power in a symbiotic mutualistic way – if the Parliament enacts a statute, the executive government is required to administer that statute. The stimuli

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118 J Bryce, *The American Commonwealth*, Vol I, 49.

for the exercise of the executive power is the potential,[119] or actual, exercise of the legislative power. This is what is meant by pure functionalism.

Section 61 does not create *pure* functionalism. The executive power of the Commonwealth is a special species; the executive power extends beyond the execution and maintenance of the laws of the Commonwealth. As s 61 says, the executive power *extends to* the execution and maintenance of "*this Constitution*". That is, the ambit of the executive power is extended beyond purely executing and maintaining the laws of the Commonwealth in a symbiotic way. An additional matter is included within the functionalist operation of the executive power, and that is the execution and maintenance of "this Constitution". The execution and maintenance of the Constitution does not *require* the in tandem operation of the legislative and judicial powers of the Commonwealth – but it often does. The execution and maintenance of the Constitution includes such things as the execution of the prerogatives of the Crown.

If we are to accept that the prerogatives of the Crown are textually recognised by the preamble and ss 2, 44(vi), 64 and 74 of the Constitution, and are recognised by the common law, then those powers, preferences, capacities and immunities are impliedly recognised in "*this* Constitution", as that expression is used in s 61. The execution and maintenance of these common law attributes is an act of executing or maintaining "this Constitution". The source of the attributes is the Crown; the functionalist authority to give effect to those attributes is the executive power of the Commonwealth. It is not pure functionalism (as understood in a federal compact which creates independently operating legislature, executive and judicial *powers*), as the execution and maintenance of the prerogative does not require the potential or actual exercise of the legislative power to occur.

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119 "Potential" in the sense that the acts associated with the enactment of legislation are done as a precursor to the enactment of the legislation by the executive government. For example, the preparation of bills or delegated legislation. This may be said to be in contrast with the holding in *Williams [No 2]*.

In summary, the wording of s 61 of the Constitution, in that it describes the executive power of the Commonwealth as extending to the execution and maintenance of the Constitution and of the laws of the Commonwealth, necessarily uses the words "extends to". The subject matter of the section extends beyond a purely functionalist construction of the executive power. The use of the words "extends to" is consistent with the core argument.

The Statutory Executive Power of the Commonwealth

The executive power of the Commonwealth is the power to execute and maintain (that is, the power to administer)[120] the Constitution, and the laws of the Commonwealth. The executive power of the Commonwealth ought to be primarily understood in this functionalist sense. As Dixon J said in *Cain v Doyle*: "The legislative power is to make the laws which the Crown is to execute and maintain".[121] "[E]xecute or maintain law", was said by the then Chief Justice and others in the *Boilermakers' case*, to "imply a duty to actively watch the observance of those laws, to insist on obedience to their mandates, and to take steps to vindicate them if need be".[122] As Knox CJ and Gavan Duffy J said in the *Wool Tops case*, "execution" means "the doing of something immediately prescribed or authorised by the Constitution or Commonwealth laws".[123]

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120 A Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of the Commonwealth", in P Brazil & B Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia with opinions of Solicitors-General and the Attorney-General's Department*, Vol I, 129, 131.

121 (1946) 72 CLR 409, 423.

122 (1956) 94 CLR 254, 271 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). Their Honours were quoting with approval the earlier words of Isaacs J in *State of New South Wales v Commonwealth* (1915) 20 CLR 54, 93.

123 (1922) 31 CLR 421, 432.

As a functionalist power, the executive power is an authority that is always in a state of flux. As the legislature enacts a greater apparatus for the executive to cling on to, the executive power enlarges; as the legislature enacts a smaller apparatus for the executive to attach its executive action to, the executive's domain of action shrinks. Additionally, the executive power of the Commonwealth permits the executive government to exercise those powers, functions and attributes, that are expressly and impliedly attributed to the Governor-General, or the Crown, through the words "execution and maintenance of this Constitution".

This author is respectfully in agreement with Williams J, when his Honour summarised the operation of s 61 of the Constitution in the *Communist Party case,* and said:[124]

> Section 61 provides that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. The execution of the Constitution in the section "means the doing of something immediately prescribed or authorized by the Constitution without the intervention of Federal legislation" (*The Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd.* (1922) 31 CLR, at p 432). The maintenance of the Constitution therefore means the protection and safeguarding of something immediately prescribed or authorized by the Constitution without the intervention of Federal legislation.

If we are to accept that "this Constitution" in s 61 of the Constitution implies more than the common law of the Crown; and therefore implies more than the prerogatives of the Crown,

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124 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 231.

then what is "this Constitution"? The answer must be the express and implied doctrines, powers or rules incorporated (or recognised) in the Constitution. But it cannot be any doctrine, power or rule that is said to be expressed by the text of the Constitution, or implied into the Constitution; rather, there must be two limitations.

First, the power to give effect to "this Constitution" pursuant to s 61 of the Constitution must necessarily be of an executive character (or have come to be accepted as the executive's function in the "history and usages of British legislation and the theories of English law"),[125] as the power is an executive power. This is a textual requirement. The executive action which is permitted must be "executive" in nature, as that word is used in s 61, and in contradistinction to the "legislative" and "judicial" words used in ss 1 and 71 of the Constitution respectively. The "meagre words" of s 61 are not "devoid of meaning or of implication",[126] and the implication that arises by the use of the words "executive power", when the text and structure of the instrument also utilises the contrasting words "legislative power" and "judicial power", is that the use of the word executive must draw its meaning from contrasting that function of government from the two other described functions. That said, this limitation is undermined by the operation of chameleon doctrine.

Second, the power to give effect to "this Constitution" pursuant to s 61 of the Constitution must necessarily be in conformity with the Constitution; that is, the executive action permitted by s 61 cannot be action which is prohibited by the Constitution. An example of an action or an activity of the executive that is not authorised pursuant to s 61 is where that purported executive action is in breach of some doctrine, power or rule emanating from the Constitution. More specifically, where the purported executive action is in breach of an expressed or implied limitation upon the executive, like the executive exercising a function which is exclusively the domain of the judicature – for example, the sentencing of an individual to imprisonment. The arrest and detention of a person for the

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125 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 101-102 (Dixon J).

126 *Williams [No 1]* (2012) 248 CLR 156, 362 [560] (Kiefel J).

purposes of bringing them before a court is executive action consistent with the Constitution; arresting and detaining a person indefinitely is executive action inconsistent with the Constitution, as the executive action is contrary to the implied requirement that only a court may order that a person be detained indefinitely. Arresting and detaining is atypical executive action; the first limitation – that the action is "executive" in nature – is present. The length and purpose of the detention determines whether the second limitation on the non-statutory executive power has been usurped.

CHAPTER SIX

THE SUBSTRATUM OF THE CORE ARGUMENT

I INTRODUCTION

Chapter 5 articulated the core argument and offered a description of the executive power of the Commonwealth (which is made possible by doctrinal clarity having been achieved in respect of the prerogative). The articulation of the core argument is the completed statement of the theorem – it is not a complete argument as to why the core argument is correct. This Chapter identifies and tabulates six aspects of evidence or argument, which support the core argument. That is, each of the arguments in this chapter is a supporting argument (or pillar) which fortifies the strength of the core argument. Each of those pillars relies upon one or more modalities of interpretation (or reasoning). That is, if it is said that looking to history, for example, is a valid and informative way of interpreting the Constitution, then each of the historical aspects which are identified in this chapter point towards the correctness of the core argument.

II THE MODALITIES OF INTERPRETATION

In a series of scholarly articles, Federal Court judge Susan Kenny considered the High Court's use of six different "modalities" of interpretation in performing its function of interpreting the Constitution.[1] The six modalities of interpretation are said to be: historical,

1 S C Kenny, "The High Court on Constitutional Law: The 2002 Term" (2003) 26 *University of New South Wales Law Journal* 210; S C Kenny, "The High Court of Australia and modes of constitutional interpretation" (FCA) [2007] FedJSchol 10; S C Kenny, "The High Court of Australia and Modes of Constitutional Interpretation" in T Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for*

textual, structural, doctrinal, ethical, and prudential modes. Justice Kenny borrowed this framework from the American constitutional scholar, Philip Bobbitt, who, in his twin works, *Constitutional Fate*, and *Constitutional Interpretation*, set out these six constitutional modalities. Bobbitt described a *modality* as "the *way* in which we characterise a form of expression as true".[2] The modalities are a type or form of reasoning – and it is implicit in the resort to one or more modes of reasoning that each of those forms of reasoning are legitimate, and have interpretative force. Associate Justice of the Supreme Court of the United States, Stephen Breyer, described modalities more plainly as "basic tools" which "[a]ll judges use … to help them accomplish the task".[3] Breyer said that "most judges agree that these basic elements – language, history, tradition, precedent, purpose and consequence – are useful" in construing legal text, but that judges do not agree "about just where and how to use them".[4]

Philip Bobbitt wrote in his *Constitutional Interpretation*:[5]

> These six modalities of constitutional argument are: the historical (relying on the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man in the street"); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets out); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a

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a New Age (Judicial Commission of New South Wales, 2007) 45. A further use of Bobbitt's "modalities of interpretation" can be seen in N Aroney, "Towards the "Best Explanation" of the Constitution: Text, Structure, History and Principle in *Roach v Electoral Commissioner*" (2011) 30 *University of Queensland Law Journal* 145.

2 P Bobbitt, *Constitutional Interpretation*, 11.

3 S G Breyer, *Active Liberty, Interpreting Our Democratic Constitution*, 7.

4 Ibid 7-8.

5 P Bobbitt, *Constitutional Interpretation*, 12-13.

particular rule).

Utilising Bobbitt's modalities, Nicholas Aroney has written in relation to the use of these interpretive methods that:[6]

> … when closely analysed, there is a special relationship between arguments based on text, structure and history that is not shared by ethical and prudential arguments when these are not adequately tethered to the Constitution considered as a document. When text, structure and history are meticulously examined the findings of each inquiry tend to reinforce the others. Insights acquired through careful investigation into the historical process by which a constitution came into being, for example, often shed light on otherwise unnoticed textual details and overlooked structural relationships. Underlying principles, motivating purposes and even prudential compromises which demonstrably shaped the document are also illuminated by textual-structural-historical inquiry, and a more thorough, detailed and informed understanding of the constitution emerges as a result.

Modalities of interpretation is another way of articulating the strength of a given argument, and each modality invites the reader to utilise one or more tools of interpretation. In reflecting upon the use to be made of tools of constitutional interpretation, Chief Justice French said, extra-curially, that:[7]

> … they require attention to be paid to the nature and content of the text, its drafting history as illustrated by the successive drafts at the Conventions, as well

6 N Aroney, "The High Court on Constitutional Law: The 2012 Term, Explanatory Power and the Modalities of Constitutional Interpretation" (2013) 36 *UNSW Law Journal* 863.

7 R S French, "Interpreting the Constitution – Words, History and Change" (2011) Vol 40 *Monash University Law Review*, 29, 43.

> as the informed commentaries of those who were involved in, or close to, the drafting process. Historical facts of the time may be relevant to an understanding of the purpose of words that, taken out of context, might mislead. The common law which is the ether in which all legal texts are embedded, is also a necessary part of that understanding, not least because the interpretative mechanisms are, for the most part, derived from the common law.

This chapter applies these modalities of interpretation to support the core argument. In particular, emphasis is placed upon the combined textual-structural-historical modalities outlined by Professor Aroney in the quotation above. By reference to one or more of these modalities and the supporting evidence, the strength of the core argument is pressed – demonstrating why the core argument in Chapter 5 is true.

III Doctrinal History

Referring to the High Court, Sir Isaac Isaacs said:[8]

> … it is the duty of this Court, as the chief judicial organ of the Commonwealth, to take judicial notice, in interpreting the *Australian Constitution,* of every fundamental constitutional doctrine existing and fully recognized at the time the Constitution was passed, and therefore to be taken as influencing the meaning in which its words were used by the Imperial Legislature.

The history and character of the "fundamental constitutional doctrine" known as the prerogative was set out in Chapter 2. In particular, the history as to how the prerogative predated the emergence of the Montesquieuian division of governmental powers – into the legislative, executive and judicial powers – was traced. The chapter makes it clear that the executive function, or executive part of government, that is the power to give effect to the

8 *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 411-412.

executive or ministerial part of government is one of the many prerogatives of the Sovereign.

As a pillar in support of the core argument, it is contended that in understanding the place of the prerogative within the Australian constitutional framework, it is first necessary to correctly understand the constitutional landscape, as it was prior to the enactment of the Constitution Act. It is only through this process that the constitutional text is correctly illuminated. The doctrinal history of the prerogative is that the prerogative evolved from a set of qualities or attributes of the reigning Sovereign to a relatively well-defined set of rights, preferences, capacities and immunities, recognised by the common law. The prerogative's features emerged from the fog of antiquity. They became a description of the King's majesty in the post-Conquest Angevin Empire, and took shape as rights, preferences, capacities and immunities in the tumultuous seventeenth-century. In the long struggle between Crown and Parliament, the Crown's prerogative was gradually reduced to a set of rights, preferences, capacities and immunities that were vested in the Sovereign, but were exercised in most part on the advice of the Sovereign's ministers of state. In this way, the prerogative became democratised – the Parliament could debate the exercise of the prerogative, and the Parliament could regulate or extinguish any limb of the prerogative.[9] As the prerogatives were doctrinally sourced to the Crown and recognised by the common law, the Parliament could, in executing a statute, modify or extinguish a prerogative of the Crown, and ministries became accountable to the Parliament for the advice given to the Sovereign in exercising the prerogative.

The prerogative was inherited by the Australian colonies as part of the colonisation of the Australian continent by the British Crown.[10] Indeed it was the exercise of a single prerogative of the Crown – the annexation of New South Wales – which brought the English common law to the continent.

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9 *Attorney-General v De Keyser's Royal Hotel Limited* [1920] AC 508.

10 B H McPherson, *The Reception of English Law Abroad*, 98; see also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 34-35 (Brennan J).

The prerogative was always seen in the Australian colonies as including the power to execute the laws and administer the colony. What William Forsyth, not long before Federation, called "the executive power of the Crown",[11] permitted the Sovereign to give administrative effect to the special rights, preferences, capacities and immunities vested in the Sovereign.

This is the doctrinal heritage into which the new Commonwealth was born. It is against the backdrop of the common law, and this doctrinal heritage that the prerogatives of the Crown in right of the Commonwealth ought to be construed.

The prerogatives of the Crown pre-dated Federation. The question then becomes; what, if anything did the enactment of the Constitution Act do to affect the antecedent body of doctrine? Given that there was nothing for the Constitution to do to *establish* the prerogative, what did the Constitution Act do to recognise or modify it?

As set out in the core argument, the Constitution presupposes the continued existence of the common law, and the Constitution Act expressly recognises that the Commonwealth was established *under the Crown*, and *under the Constitution*. The text of the preamble, ss 2, 44(iv), 64 and 74 of the Constitution each textually recognise and affirm the continued existence of the Crown, and the preamble, s 2, 64 and 74 textually recognise and affirm the continued operation of the prerogative within the Commonwealth context. In particular, s 64, by its use of the words "and shall be the Queen's Ministers of State for the Commonwealth", gave both explicit recognition of the continued operation of the prerogatives of Crown in the Commonwealth context, and of the devolution or investment of that prerogative in the Commonwealth.

There is nothing in the use of the words the "executive power of the Commonwealth" in s 61 which ought to lead to the conclusion that the textual notion of that one common law power of the Crown – the power to execute the laws – ought to exclude the operation of the remaining common law rights, preferences, capacities or immunities.

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11 W Forsyth, *Cases and Opinions on Constitutional Law and the Various Points of English Jurisprudence, Collected and Digested from Official Documents and other sources*, 180.

When regard is had to the doctrinal history of the prerogative, it permits an understanding of the prerogative consistent with the core argument. The prerogative's doctrinal history is a pillar that supports the correctness of the core argument.

IV THE FRAMERS' INTENTIONS

Andrew Inglis Clark wrote in his *Studies* in 1901:[12]

> It has been repeatedly stated that the fundamental rule for the interpretation of a written law is to follow the intention of the makers of it as they have disclosed it in the language in which they have declared the law.

Chapter 4 set out the drafting history s 64 of the Constitution – the affirmation that the members of the Federal ministry "shall be the Queen's Ministers of State for the Commonwealth". In doing so, this thesis has sought to demonstrate the authorial intention.

There are two interwoven propositions. First, the framers were either already familiar with *Toy v Musgrove*[13] before the First Convention or, by reason of the Debates, became well aware of it during the Conventions. Second, not only were the delegates very aware of *Toy v Musgrove*, by their individual contributions to the in-committee consideration of draft cl 8 of Chapter II (subsequently s 64 of the Constitution), the resolution that was passed to amend that draft clause, and by the actions of all of the delegates, the framers can be taken to have clearly collectively intended that their addition to s 64 of the Constitution of the affirmation that the Federal ministers "shall be the Queen's Ministers of State for the Commonwealth" affirmed their desire to "clothe the ministers individually with that power and authority which ministers in Great Britain possess as responsible ministers of the

12 A Inglis Clark, *Studies in Australian Constitutional Law*, 19.

13 (1888) 14 VLR 349; see also J Waugh, "*Chung Teong Toy v Musgrove* and the Commonwealth Executive", (1991) 2 *Public Law Review* 160.

Crown".[14] In this respect, Dr John Waugh agreed: "the intention [of the framers] was clear".[15]

The facts of the case, and the reasons for decision of the six justices of the Supreme Court of Victoria, have been canvassed in Chapter 3. *Toy v Musgrove* was *the* constitutional case of the twenty years leading up to Federation. It was widely reported in the newspapers of every Australian colony.[16] It would have been known to any serious statesman in the Colony of Victoria, and would have prudently been considered by Crown Law officers in the other colonies.

Three factors are relevant. First, the decision was contemporaneous with the First Convention. Second the Judicial Committee of the Privy Council had heard the case in 1890 and 1891, resulting in Henry Wrixon being late to arrive at the First Convention as a Victorian delegate. Third, Henry Wrixon and Alfred Deakin informed the delegates of the First Convention of the words and effect of the Supreme Court's *Toy v Musgrove* decision, and the Board's judgment in *Musgrove v Toy*. Each of these factors meant that the decision, and the constitutional principles ventilated in that decision was of great assistance in the process of construing the Constitution. The notoriety of the litigation, the centrality of the constitutional issues considered, the proximity of the litigation to the First Convention, and the nexus between the Supreme Court's decision and the way in which the Debates of the First Convention unfolded (and, in particular, the resulting text of "the Queen's Ministers of State for the Commonwealth" in s 64), all strongly support the contention that the decision in *Toy v Musgrove* can, and should, be used to assist in both understanding the relationship between the prerogative and the executive power of the Commonwealth, and in that respect, advancing the core argument.

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14 *Con Deb. Syd, 1891*, 768-9.

15 J Waugh, "Lawyers, Historians and Federation History", in R French, G Lindell and C Saunders (eds), *Reflections on the Australian Constitution*, 29.

16 See Chapter 3.

This is not the place to restate in detail the nature of the litigation, or the reasons of the six members of the Supreme Court of Victoria. That has already been done in Chapter 3. Rather, the point to be made here is to identify how a connexion (for interpretative purposes) is to be made between that litigation and the core argument. This is done through three methods.

First, so central was the *Toy v Musgrove* decision to the drafting of the expression "… and shall be the Queen's Ministers of State for the Commonwealth", that it is almost impossible to avoid the explanatory power of the connexion made by the framers to the decision, and their choice of language in ss 2, 61 and 64. That connexion commands that interpretive significance be placed upon the reasons for the decision in *Toy v Musgrove* when construing s 64 of the Constitution.

Second, the method of connecting *Toy v Musgrove* to the interpretation of the Constitution is to focus upon the case for its doctrinal value. In shedding light upon the nature of the prerogative received by the Commonwealth, and the operation of s 2 of the Constitution – which allows the Sovereign to assign to the Governor-General those "powers and functions" of the Sovereign – this sits comfortably with the majority's reasoning in *Toy v Musgrove* that a governor only has those prerogative powers and functions that are delegated to him (or her) by the Sovereign.

Third, the use of the *Official Records* of the First and Second Conventions is now a routine aspect of constitutional interpretation. As has already been identified in Chapter 4, the High Court in *Cole v Whitfield*[17] made clear that reference could be made to the Convention Debates "for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged".

17 (1988) 165 CLR 360, 385.

In this sense, the core argument is supported by the historical materials set out in Chapters 3 and 4, the three conclusions and the coincidence that can be drawn from the historical materials, and which are set out at the end of chapter 4. The *Toy v Musgrove* litigation is connected to the core argument by the framers in the Convention Debates – by their explicit, and repetitious use of the reasons of the judges of the Supreme Court of Victoria in that landmark decision in drafting the language of ss 2, 61 and 64 of the Constitution.

Chapter 4 draws three conclusions. The first two relate to the intentions of the framers in respect of the wording of s 64 of the Constitution, and the third relates to what the framers said, or did, or did not say or do, in relation to the wording of s 61 of the Constitution. The strength of these three conclusions (coupled with the significant coincidence) identified at the end of Chapter 4, support the correctness of the core argument, and serve as strong historical reasons for accepting the core argument.

V ARTICLE II AND CHAPTER II

Textual and structural modes of interpretation can be invoked by contrasting the text and structure of the *United States Constitution* and the Australian Constitution. This has been done before.[18]

Article I, section 1 of the *United States Constitution* states that: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives". Section 1 of the Constitution provides that: "The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament," or "The Parliament of the Commonwealth."

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18 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 89-91 (Dixon J); *R v Kirby & Ors; ex parte Boilermarkers' Society of Australia* (1956) 94 CLR 254, 274-279 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); E M Hunt, *American Precedents in Australian Federation*; W G Buss, "Andrew Inglis Clark's Draft Constitution, Chapter III of the Australian Constitution, and the Assist from Article III of the Constitution of the United States", [2009] 33 *Melbourne University Law Review* 718.

Article II, section 1 of the *United States Constitution* states that: "The executive Power shall be vested in a President of the United States of America". Section 61 of the Constitution provides that: "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth".

Article III, section 1 of the *United States Constitution* states that: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office". Section 71 of the Constitution provides that: "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."

The similarity of the text and structure between the two constitutions is striking. The use of similar phraseology to commence Article II, section 1, and Chapter II, section 61 is obvious; and the fact that these provisions each commence a new Article, or Chapter, which of itself concerns one of Montesquieu's trinity of powers (legislative, executive and judicial powers) is also obvious. This led the majority in the magisterial *Boilermakers' case* – the locus classicus of the High Court's separation of powers jurisprudence – to ascribe constitutional significance to this similarity in the text and structure, and to describe the adoption of the United States Constitution's text and structure as no "mere draftsman's arrangement".[19] As the majority in the *Boilermakers' case* said:[20]

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19 *R v Kirby; Ex parte Boilermakers' Society of Australia* ("the *Boilermakers' case*") (1956) 94 CLR 254 (Dixon, McTiernan, Fullagar and Kitto JJ).

20 *Boilermakers' case* (1956) 94 CLR 254, 275.

> If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inferences from Chaps. I, II and III and the form and contents of ss. 1, 61 and 71. It would be difficult to treat it as a mere draftsman's arrangement. Section 1 positively vests the legislative power of the Commonwealth in the Parliament of the Commonwealth. Then s. 61, in exactly the same form, vests the executive power of the Commonwealth in the Crown. They are the counterparts of s. 71 which in the same way vests the judicial power of the Commonwealth in this Court, the federal courts the Parliament may create and the State courts it may invest with federal jurisdiction. This cannot all be treated as meaningless and of no legal consequence.

The so-called "chameleon doctrine" aside, consistent with the reasoning in *Boilermakers'*, and in reliance upon the text and structure of the Constitution, each of the constitutionally entrenched "powers" – the legislative, executive and judicial powers – ought to be defined or described in a functionalist sense, and in contradistinction to each other. Just as the majority in *Boilermakers'* were particular about the need to confine the activities of the judicature to exercises of judicial power, the majority, in excluding matters from the ambit of the judicial power, touched upon what it means to "execute or maintain laws". The majority quoted with approval the earlier words of Isaacs J in *New South Wales v Commonwealth*,[21] where his Honour said:[22]

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21 (1915) 20 CLR 54.

22 *Boilermakers' case* (1956) 94 CLR 254, 271; and quoting Isaacs J in *New South Wales v Commonwealth* (1915) 20 CLR 54, 93.

> Courts do not execute or maintain laws relating to trade and commerce. Those words imply a duty to actively watch the observance of those laws, to insist on obedience to their mandates, and to take steps to vindicate them if need be. But a Court has no such active duty: its essential feature as an impartial tribunal would be gone, and the manifest aim and object of the constitutional separation of powers would be frustrated. A result so violently opposed to the fundamental structure and scheme of the Constitution requires, as I have before observed, extremely plain and unequivocal language.

Whilst this statement concerns the characterisation of the power and functions *of courts*, the same meaning applies to the description of the work to be done by *the executive* – the words used in s 61 of the Constitution. That this description is expressly approved by the majority in *Boilermakers'* is further, and even more weighty reason to conclude that if judicial power is understood in a functionalist (or Montesquieuian sense), then so ought the executive power.

It is argued that, similarly, it is no mere draftsman's arrangement that Article II, section 1, and Chapter II, section 61 of the two constitutions are so similar. To borrow what the majority said in *Boilermakers'*, this "cannot … be treated as meaningless and of no legal consequence". Quick and Garran made the point in the preface to their great work in 1901 that:[23]

> There is hardly a phrase in [the Constitution] without a history, or without analogy with a phrase which in some other Constitution has been the subject of exhaustive arguments and judicial decisions. The Commentaries of the great American jurists, and the numerous judgments on constitutional questions given by the Supreme Court of the United States during the last century, are full of

23 J Quick, R R Garran, *The Annotated Constitution of the Australian Commonwealth*, viii.

profound reasoning which is applicable to the words of this Constitution.

In the early decision of *D'Emden v Pedder*,[24] Griffith CJ, speaking for the Court, expressed the view that in comparing the language in the *United States Constitution* and the Australian Constitution:[25]

> So far, therefore, as the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance.

Griffith CJ continued:[26]

> We cannot disregard the fact that the Constitution of the Commonwealth was framed by a Convention of Representatives from the several colonies. We think that, sitting here, we are entitled to assume—what, after all, is a fact of public notoriety—that some, if not all, of the framers of that Constitution were familiar, not only with the *Constitution of the United States*, but with that of the Canadian Dominion and those of the British colonies. When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the *Constitution of the United States* which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like

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24 (1904) 1 CLR 91.

25 (1904) 1 CLR 91, 112.

26 (1904) 1 CLR 91, 113.

interpretation.

Having regard to the canonical nature of the *Boilermakers' case*, and with these interpretative principles in mind, it is instructive to examine how the Supreme Court of the United States has construed the operation of Article II of the *United States Constitution*. In the leading modern decision that considered the scope of the executive power in the United States – *Youngstown Sheet & Tube Co v Sawyer*[27] – in his concurring judgment, Associate Justice Robert Jackson said:[28]

> The Solicitor General seeks the power of seizure in three clauses of the Executive Article, the first reading, "The executive Power shall be vested in a President of the United States of America." Lest I be thought to exaggerate, I quote the interpretation which his brief puts upon it: "In our view, this clause constitutes a grant of all the executive powers of which the Government is capable." If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones.
>
> The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And, if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power, but regard it as an allocation to the presidential office of the generic powers thereafter stated.

27 343 US 579 (1952) (the *Steel Seizure case*).

28 343 US 579, 640-641 (1952).

There are two constructional points to be made. First, the text and structure of the vesting clause of the executive power of the President of the United States, and Article II more generally, is strikingly similar to that of Chapter II of the Constitution. They both commence with a declaration about which constitutional entity shall be, or is, invested with the executive power, and then Article II and Chapter II proceed to set out a number of express, or particular, executive powers or authorisations – some modelled on traditional British prerogative powers, others particular to the United States or the Commonwealth. Second, Justice Jackson rejected a submission that Article II, section 1, "constitutes a grant of all the executive powers of which the Government is capable". In keeping with the objects and causes of the American Revolution, his Honour opined that the executive power ought *not* be construed as including "the prerogative exercised by George III". Justice Jackson concluded that the executive power vested in the President of the United States of America is to be found in the wording of Article II, including the particularised executive powers which are expressly stated in the Article. He rejected the suggestion that the executive power is to be understood by reference to the prerogatives of the King. This is the orthodox view of the American presidency. It was said that the founders of the American Republic:[29]

> … were not content merely to erect higher barriers against encroaching power or to formulate new and more explicit charters of the people's liberties. In their ambitious desire to root out tyranny once and for all, they went beyond what Englishmen of 1215 or 1688 had attempted: their new constitution destroyed "the kingly office" outright and "absolutely divested [it] of all it's rights, powers and prerogatives," so that "all other persons whatsoever shall be and for ever remain incapable of the same: and that the said office shall henceforth cease and

29 G S Wood, *The Creation of the American Republic, 1776-1787*, 135-136; see also A Tomkins, *Public Law*, 39.

> never more either in name or substance be re-established within this colony". The Americans, in short, made of the gubernatorial magistrate a new kind of creature, a very pale reflection indeed of his regal ancestor.

John Adams proposed the stripping "of most of those badges of domination, called prerogatives", and, in the context of the drafting of the constitution of Virginia, Thomas Jefferson would call this type of executive magistrate, an "Administrator".[30] It should also be noted that there has been a counter-argument that the American Revolution ought not be characterised as a rejection of royal authority.[31] Nevertheless, Justice Jackson's reasoning in the *Steel Seizure case* adopted this anti-prerogative version of history.

In explaining how the founders of the American Constitution crafted their executive magistrate, James Bryce said:[32]

> Assuming that there was to be such a magistrate, the statesmen of the Convention, like the solid practical men they were, did not try to construct him out of their own brains, but looked to some existing models. They therefore made an enlarged copy of the State governor, or to put the same thing differently, a reduced and improved copy of the English king. He is George III shorn of a part of his prerogative by the intervention of the Senate in treaties and appointments, of another part by the restriction of his action to Federal affairs, while his dignity as well as his influence are diminished by his holding office for four years instead of for life.[33] His salary is too small to permit him either to

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30 G S Wood, *The Creation of the American Republic, 1776-1787*, 137.

31 E Nelson, *The Royalist Revolution, Monarchy and the American Founding*; and T Helfman, "Crown and Constitution", (Book Review)(2015) *Harvard Law Review*, Vol 128, 2234.

32 J Bryce, *The American Commonwealth*, Vol I, 48-49.

33 Lord Bryce wrote in a footnote here: "When the Romans got rid of their king, they did not really extinguish the office, but set up in their consul a sort of annual king, limited not only by the short duration of his power, but also by the existence of another consul with equal powers. The Americans hoped to restrain their President not merely by the shortness of his term, but also by diminishing the

> maintain a Court or to corrupt the legislature; nor can he seduce the virtue of the citizens by the gift of titles of nobility, for such titles are altogether forbidden. Subject to these precautions, he was meant by the constitution-framers to resemble the State governor and the British king, not only in being the head of the executive, but in standing apart from and above political parties. He was to represent the nation as a whole, as the governor represented the State commonwealth. The independence of his position, with nothing either to gain or to fear from Congress, would, it was hoped, leave him free to think only of the welfare of the people.

If it is accepted that the text and structure of s 61 of the Constitution is an appropriation of the text and structure of Article II, section 1 of the *United States Constitution*, then, it is reasonable to argue that, absent some other textual indicator, the framers of the Constitution were importing the American idea of "the executive Power".

VI SIMILARITIES BETWEEN THE TWO CONSTITUTIONS

The Australian Constitution was drafted by the framers to suit the needs of a federation where residual power was to be left to the newly created States, and the federation was to combine the fabric of the system of responsible government (which was very familiar to each of the delegates of the two Conventions) with the idea of a bicameral parliament in which each chamber had almost co-equal power in respect of legislation.

Whilst the framers were colonial statesmen within an Empire whose constitution was primarily founded on the common law, the political compact which was to become the Australian Federation needed to be founded on a written text. The fact that the compact would be founded on a written text was not, of itself, an innovation; what was an innovation for the framers was the crafting of a written text which established a federation.

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power which they left to him; and this they did by setting up another authority to which they entrusted certain executive functions, making its consent necessary to the validity of certain classes of the President's executive acts. This is the Senate, where more anon".

The framers had before them two models for a written constitution. The *British North America Act 1867* was a recently enacted written constitution enacted within the framework of the British Empire, and against the background of the common law. The other example was that of the *United States' Constitution.* Perhaps because of the influence of the writings of James Bryce, and his *The American Commonwealth*, and perhaps because under the early influence of the Tasmanian Attorney-General and delegate, Andrew Inglis Clark, the early drafts of the Commonwealth Bill appropriated the text and structure of the United States Constitution as the primary structural example of a written constitution; and in some respects, it was a significant textual model for the Commonwealth Bill.

Recourse to the decisions of the Supreme Court of the United States

Just as the judges of the High Court are permitted to have recourse to the common law and principles of constitutional jurisprudence established by the courts at Westminster in construing the words of the Constitution, they are also permitted to look to the American jurisprudence on the construction of the American constitutional text. Before the original three justices took their seats on the High Court, Inglis Clark wrote in his *Studies*:[34]

> The constitutional law of the mother country will therefore continue to be a guide and a fountain of knowledge and authority on many matters included in the constitutional law of Australia, but in regard to many other portions of it the historic decisions of the Supreme Court of the United States which were delivered by Chief Justice Marshall and his associates during the first half century of the Republic cannot fail to be followed in Australia wherever the language to be interpreted is substantially the same as that to which the irresistible reasoning of those decisions was applied.

34 A Inglis Clark, *Studies in Australian Constitutional Law*, 5.

Once the original three justices who constituted the High Court of Australia took their seats in 1903, this principle of constitutional interpretation quickly took hold. In *D'Emden v Pedder*,[35] Griffith CJ observed that:[36]

> We are not, of course, bound by the decisions of the Supreme Court of the United States. But we all think that it would need some courage for any Judge at the present day to decline to accept the interpretation placed upon the *United States Constitution* by so great a Judge so long ago as 1819, and followed up to the present day by the succession of great jurists who have since adorned the Bench of the Supreme Court at Washington. So far, therefore, as the *United States Constitution* and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance.

Sir Samuel said when the Court finds "embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the *Constitution of the United States* which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation".[37]

Not long after, in affirming this rule of construction in *Deakin v Webb*, the Chief Justice gave this rule of construction a particularly originalist flavour:[38]

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35 (1904) 1 CLR 91.

36 (1904) 1 CLR 91, 112; see also *New South Wales v Commonwealth* (1915) 20 CLR 54, 68 (Griffith CJ) where the Chief Justice accepted that recourse may be had to the reasoning of the Supreme Court of the United States.

37 (1904) 1 CLR 91, 113.

38 (1904) 1 CLR 585, 616.

> … the reasoning of the Supreme Court [of the United States] in *Dobbins's Case* ... derives additional weight from the circumstance, adverted to in the judgment of this Court in *D'Emden v. Pedder* ... , that, the interpretation of the *American Constitution* as to this point having been long since settled by judicial decision, it is a reasonable inference that it was intended by the framers of the *Australian Constitution*, when adopting similar language, that like provisions should receive like interpretation.

These statements of principle are sourced from the original leading cases in the High Court which established the doctrine of immunities – a doctrine which was subsequently rejected in the *Engineers' case* in 1920.[39] Nonetheless, there are other occasions where the judges of the High Court have had regard to the similarities in language between the *United States' Constitution* and the Australian Constitution in construing the language of the Australian Constitution.[40] Sir Owen Dixon saw Australia's constitutional law as standing "midway between the two great common law systems" of England and the United States. He said: "We study them both; we feel that, in some measure, we understand them both, and we seek guidance from both of them".[41]

The similarity between the text and structure of the *United States Constitution* and the Australian Constitution, particularly in respect of the wording of ss 1, 61 and 71, means the High Court could do two things. First, the High Court could conclude that given that the framers clearly appropriated the text and structure of the American instrument (as the High Court did in the *Boilermakers' case* in respect of judicial power), the High Could should

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39 (1920) 28 CLR 129.

40 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 (Griffith CJ, Barton and O'Connor JJ); *R v Barger* (1908) 6 CLR 41 (Isaacs J and Higgins J); *South Australia v Victoria* (1911) 12 CLR 667 (Griffith CJ and O'Connor J); *Bank of NSW v Commonwealth* ("*Bank Nationalisation case*") (1948) 76 CLR 1 (Starke J and Dixon J); *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 (Dixon CJ and Menzies J); *Felton v Mulligan* (1971) 124 CLR 367 (Windeyer J); *Brown v R* (1986) 160 CLR 171 (Gibbs CJ, Wilson J and Brennan J); *Victoria v Commonwealth* (1975) 134 CLR 338 (Mason J).

41 O Dixon, "Two Constitutions Compared", *Jesting Pilate*, 103.

also conclude that the Constitution's text and structure imports an American understanding (that is, a functionalist understanding) of the executive power. Secondly, the High Court should conclude that the Article II jurisprudence of the Supreme Court of the United States is relevant (or at least helpful) in construing the scope of the executive power of the Commonwealth; particularly in relation to how the Supreme Court of the United States has construed the words "the executive Power", and the words to "take Care that the Laws be faithfully executed", in Article II of the American instrument.

United States jurisprudence

The jurisprudence surrounding Article II, section 2 and the Take Care clause is decidedly anti-monarchical. The founders of the American Republic clearly rejected a system of government which recreated part of the executive authority that Blackstone "fashioned for the British King".[42]

The *United States Constitution* is based upon the principle of construction that it is one of enumerated powers. Chief Justice John Marshall said: "This government is acknowledged by all, to be one of enumerated powers. The principle that it can exercise only the power granted to it … is now universally admitted".[43] From this first principle, the Vesting clause and Take Care clause can be construed.

In terms of the Vesting clause, Louis Fisher said that there was a difference of opinion as to the nature of the executive power between Alexander Hamilton and James Madison. Hamilton favoured a broad construction of "executive power", saying that the enumerated executive power requires a "comprehensive grant in the general clause".[44] In contrast, Madison rejected a broad executive power in relation to foreign affairs, saying that: "The power of making treaties and the power of declaring war, are *royal prerogatives* in the

42 L Fisher, *The Law of the Executive Branch: Presidential Power*, 62.

43 *McCulloch v Maryland* 17 U.S. (4 Wheat.) 316, 404 (1819).

44 L Fisher, *The Law of the Executive Branch: Presidential Power*, 64.

British government, and are accordingly treated as *executive prerogatives* by *British commentators*".[45]

Similarly, Adolphe de Chambrun wrote in 1874 that the legislative, executive and judicial departments of government "are co-ordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other, but all, rightfully done by either, is binding upon the others".[46] As was pointed out, the right to establish courts of justice "flows from the same source which determines the extent of the legislative and executive powers of government".

As already identified, the canonical decision of the Supreme Court of the United States as to the scope of the Vesting clause and Take Care clause was that of *Youngtown Sheet & Tube Co v Sawyer*[47] in 1952, and the concurring reasons of Associate Justice Robert Jackson. In the *Steel Seizure case*, as it is oft-described, Jackson J set out three categories of executive action as being authorised by the executive power. The first category was executive action done "pursuant to an express of implied authorisation of Congress",[48] the second category was where the President acts "in absence of either a congressional grant or denial of authority".[49] Jackson J's third category was where the President undertakes "measures incompatible with the expressed or implied will of Congress".[50]

In more recent scholarship, Professors Jack Goldsmith and John Manning have shone light upon what they describe as the President's "completion power", as an understudied feature of executive power.[51] Goldsmith and Manning described the President's completion power as the President's "authority to prescribe incidental details needed to

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45 J Madison, *The Writings of James Madison*, 150 (original emphasis); L Fisher, *The Law of the Executive Branch: Presidential Power*, 69.

46 A de Chambrun, *The Executive Power in the United States: A Study of Constitutional Law*, 1874, 53, and quoting the Supreme Court of the United States in *Dodge v. Woolsey*, 59 U.S. 18 How. 331 (1885).

47 343 U.S. 579 (1952).

48 343 U.S. 579, 635 (1952).

49 343 U.S. 579, 637 (1952).

50 343 U.S. 579, 640 (1952).

51 J Goldsmith, J F Manning, "The President's Completion Power" (2006) 115 *Yale Law Journal* 2280.

carry into execution a legislative scheme, even in the absence of congressional authorisation to complete the scheme".[52] The power is said to complement, but does not derive from particular statutory commands. They said that Congress can limit it. An example of congressional limitation is the denial of authority to undertake certain executive action by certain means "or by specifying the manner in which a statute must be implemented".[53] Goldsmith and Manning sourced this completion power to the dissenting judgment of Chief Justice Vinson in *Youngstown.*[54] In their *Yale Law Journal* article, Goldsmith and Manning identified a number of decisions of the Supreme Court of the United States that are said to be consistent with this theory of a completion power.[55]

IX THREE TEXTUAL REASONS

The textual mode of constitutional interpretation requires close attention to the precise language of the constitutional text to ascertain meaning from the choice of words – rather than from the purpose of the text, or the surrounding circumstances. In this respect, three aspects of the words used in ss 1, 2, 61 and 71 ought to be considered in close detail.

It is suggested that each of the three arguments below are consistent with the core argument in that they either lead to the conclusion that s 2 is a textual recognition of the Crown's ability to delegate (or assign) the prerogative powers and functions to the governor-general, or lead to the conclusion that the power spoken of in s 61 is not as wide in ambit so as to include the rights, preferences, capacities or immunities of the Crown – and that textual affirmation must be found somewhere other than s 61 for those rules of the common law.

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52 115 *Yale Law Journal* 2280, 2282 (2006).

53 115 *Yale Law Journal* 2280, 2282 (2006).

54 343 U.S. 579, 667 (1952) (Vinson CJ).

55 *Zemel v Rusk* 381 U.S. 1 (1965), 8-9; *Dames & Moore v Regan* 453 U.S. 654 (1981), 686; *Loring v United States* 517 U.S. 748 (1996).

The word "Power"

It is recalled that s 61 of the Constitution commences with the words that:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative …

The executive power is just that, *a power*. Section 61 uses the word "power", and does not include words to the effect of rights, preferences, capacities or immunities. Textually, it is very difficult to stretch the meaning of the word "power" to include preferences, capacities or immunities. To say that a species of power is vested in the Queen, and to find *within* that species a related, but clearly different species of constitutional authority, is to stretch the meaning of the word "power" well beyond the ordinarily acceptable natural meaning of the word.

The word "power" in s 61 should also be construed against the surrounding circumstances, and the parallel use of the word "power" in ss 1 and 71. In those two sections, the power must surely mean a species of constitutional authority that permits the constitutional organ that the power is invested in to exercise the authority, and that authority is a deliberative authority – it is not a word that implies, in its ordinary meaning, the inclusion of preferences, capacities, or immunities. This textual criticism as to how s 61 is supposed to recognise the capacities and immunities of the Crown was made by Leslie Zines not long after the *Tampa case*. The late Professor Zines wrote, with a hint of sarcasm, that:[56]

> … it is not clear why the immunities and privileges of the Commonwealth derived from the prerogative are to be taken as having been granted by s 61. These matters do not easily fit within the terms of the provision. They are not

56 L Zines, "The inherent executive power of the Commonwealth" (2005) 16 *Public Law Review* 279, 282. Professor Zines makes the same criticism in his commentary in H V Evatt, *The Royal Prerogative*, C14.

> related to particular powers of government, but operate to the benefit of the Commonwealth by virtue of the fact that it is a government of the Queen. They are the same privileges and immunities that apply to the States and to all the Queen's other realms unless altered by statute. It was stated in each edition of *The High Court and the Constitution*: "It would, of course, be straining the ordinary meaning of words to regard these privileges and immunities as 'powers' within s 61 of the Constitution." This was wrong. The High Court has had no difficulty.

The use of the word "power" in s 61, and that word, and not a wider expression like "authority", is a textually-based reason supporting the contention that what s 61 speaks *only* of is the species of constitutional authority which is to be understood in contradistinction to the legislative and judicial power – both being positively framed constitutional *powers*. The language of s 61 and the presence of the word "power" is a textually-based pillar to the core argument.

Section 2 of the Constitution

Section 2 of the Constitution provides that:

> A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

The language of s 2 must have some work to do in the constitutional scheme. The words "powers and functions", set as they are before the words "of the Queen", express

ownership or association to the Queen, and appear to command that those words ought to be construed as being powers and functions that the Queen is recognised to have, herself.[57]

It may be argued that the Queen would, without the presence of s 2, already have the constitutional authority to appoint a governor-general for the Commonwealth of Australia, and to delegate to that governor-general the authority to exercise that part of the prerogative that the Crown wishes to repose in the vice regal representative.

Absent a constitutional text that provides for it, the power to appoint a governor (or governor-general) is a prerogative right of the Crown.[58] Textually, the presence of s 2, in that it affirms the presence of an acknowledged prerogative power, and, in doing so, affirms the already existing common law authority of the Crown to delegate (or assign) the Crown's "powers and functions" to the governor-general, is an indicator that the powers and functions referred to in s 2 ought be understood as referring to matters pertaining to the prerogative. This statutory power has been used on at least four occasions.[59]

Put simply, the textual argument here is that the presence and purpose of s 2, in that the section refers to the "powers and functions of the Queen", ought to be textually contrasted with the words "executive power of the Commonwealth" in s 61 which allows the conclusion that the subject matter of s 61 is likely to be something different to that in s 2. Section 2 would have no constitutional work to do if, by "executive power", s 61 included all the prerogative powers and functions of the Crown – it would have been textually

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57 See J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 387-400 where, in addition to the textual argument described above, Quick & Garran point to the framers' intention that the words "of the Queen" are intended to refer to the powers and functions, being the prerogative powers and functions *of the Queen*.

58 J Chitty, *Prerogatives of the Crown*, 34; S Amos, *Fifty Years of the English Constitution, 1830-1880*, 157.

59 The first was an assignment under the Instructions to the Governor-General on 29 October 1900 of the power to grant pardons and to remit fines, penalties and forfeitures. The second was an assignment of the power to declare war against specified foreign powers in December 1941. The third was an assignment of the power to appoint Ministers Plenipotentiary and certain other diplomatic officers and to grant exequaturs in respect of foreign consular representatives on 2 November 1954. The fourth was an assignment on 30 May 1973 of the powers to appoint Ambassadors and High Commissioners to represent Australia and to give the agreement for Ambassadors and High Commissioner representing other countries in Australia.

unnecessary to include the contents of s 2, as s 61 would have covered the field. This remains so even if the purpose of s 2 was for the future conveyance of powers and functions of the Queen that were to remain the Queen's Imperial powers and functions and were not intended to be conveyed to the Commonwealth at the establishment of the Commonwealth. If that were its purpose, the argument remains the same.

This last argument – that s 2 must have work to do, and therefore there is a difference with the work to be done by s 61 – is especially the case when the ordinary rules of statutory construction are applied. In contrasting the text of ss 2 and 61, a conclusion would be drawn that the words in s 2 are not to be construed as having no meaning.

Sections 1, 71 and 61 - "shall be vested" and "is vested"

A further contention about the text can be made when comparing the *United States Constitution* and the Australian Constitution. Article II, section 1 of the *United States Constitution* commences: "The executive Power shall be vested in a President of the United States of America". Whereas, s 61 of the Constitution commences with the words: "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative …". What do we make of the noticeable difference in the precise wording of the vesting clause between the "*shall be*" statement in the *United States Constitution*, and the "*is*" declaration in the Constitution? This may be thought of as more than a draftsman's slip when one looks at the legislative and judicial power vesting clauses in ss 1 and 71 of the Constitution. Section 1 provides that "The legislative power of the Commonwealth *shall be* vested in a Federal Parliament, which shall consist of the Queen, a Senate and a House of Representatives …". Section 71 provides that "[t]he judicial power of the Commonwealth *shall be* vested in a Federal Supreme Court, to be called the High Court of Australia, …".

There is an explanation for this. It is argued that the difference in language between "shall be" and "is" can be explained by having regard to the nature of the powers in question, as they were understood prior to the enactment of the Constitution Act.

Prior to the enactment of the Constitution Act (and prior to the establishment of representative government in each of the colonies), the legislative, executive and judicial powers in the Queen's dominions were all vested in the Queen. The Queen had authority to enact legislation by reason of the Queen's legislative prerogative. The Queen had authority to execute and administer the law in the dominions by reason of the Queen's executive prerogative; and the judges exercising the judicial power were exercising the Queen's judicial prerogative. All three powers were vested in the Queen. The continued operation of the Queen's legislative and judicial prerogatives in the colonies evaporated when the Imperial Parliament established colonial legislatures and courts.

The enactment of the Constitution Act saw the legislative and judicial powers recast in the new body politic, and given to newly established constitutional bodies. The legislative power was given to the Federal Parliament (which was to consist of the existing constitutional body, being the Queen, and two new constitutional bodies – a Senate, and a House of Representatives). The judicial power was to be given, not to the Queen, but "a federal Supreme Court, to be called the High Court of Australia". These two modifications are to be contrasted with the executive power. The executive power was vested in the Queen prior to the enactment of the Constitution Act, and, after the enactment of the Constitution Act, s 61 *continued this investiture* in the Queen of executive power. This is how we should understand Sir Isaac Isaacs' statement in the *Wool Tops case* that in respect of the opening words of s 61, "[a]s to the first declaration it is a renewed statement of the law and introductory of what follows".[60] Sir Isaac Isaacs continued to approvingly quote Lord Halsbury when he said that "[t]he executive authority is vested in the Crown *as part of* the prerogative".[61]

The Constitution uses the expression "shall be" in ss 1 and 71, where a power of the Commonwealth was being vested in a newly established constitutional body – in the

60 *Commonwealth & the Central Wool Committee v Colonial Combing, Spinning & Weaving Co Ltd* (*Wool Tops case*) (1922) 31 CLR 421, 437.

61 (1922) 31 CLR 421, 437, quoting H S Gifford (Earl Halsbury), *Halsbury's Laws of England*, (1905-1916) Vol. VI, 318 (emphasis added).

legislative power's case, the Parliament of the Commonwealth, and in the judicial power's case, in the High Court of Australia. In contradistinction to this, the expression "is" was used where the Constitution merely declares that the power is vested in a *pre-existing* body, which already has invested in it the power being described – in the executive power's case, in "the Queen".

The Constitution invests the legislative power and judicial power in the Federal Parliament and the High Court respectively, therefore the constitutional text uses the words "shall be", whereas the Constitution declares an existing fact, that the executive power is invested in the Queen, and therefore the words "is vested" is used in s 61.

Articles I, II and III of the *United States Constitution* use the words "shall be vested" in respect of the legislative, executive and judicial powers in the United States. The work to be done by the opening words of each of these articles is to vest the powers in newly established constitutional bodies – the Congress, the President and the Supreme Court of the United States. None of these three Articles make a declaration of an existing constitutional fact – unlike s 61 of the Constitution.

XI THE EARLY OPINION OF THE ATTORNEY-GENERAL

A clearer understanding of the relationship between the prerogative and the executive power of the Commonwealth can be gleaned by looking at how the executive government of the Commonwealth understood its own constitutional authority at the time of Federation and in the early years of Federation, prior to the High Court of Australia creating a body of case law. Additionally, given that many of the leading figures in the pre-War Commonwealth Parliaments were leading figures during the drafting of the Constitution, we can obtain the double-advantage that those who were involved in the drafting may bring to their new roles in the Commonwealth Parliament considerable learning and insight as to the constitutional structure of the Commonwealth.

It is suggested that the locus classicus for determining what powers the executive government of the Commonwealth thought it had is a consideration of the legal advice

given by the first law officer of the Commonwealth, the Attorney-General. In the well-known *Vondel* opinion,[62] Alfred Deakin advised then Prime Minister, Edmund Barton, in 1902 that:[63]

> The scope of the executive authority of the Commonwealth is therefore to be deduced from the Constitution as a whole. It is administrative, as well as in the strict sense executive; that is to say, it must obviously include the power not only to execute laws, but also to effectively administer the whole Government of which Parliament is the legislative department.
>
> There is, however, another and fundamental consideration upon which it is only necessary in this connection to touch briefly, but the importance of which can scarcely be overestimated.
>
> The executive authority of the Commonwealth, unlike its legislative authority, is derived in the first instance directly and immediately from its fountain-head, the Crown. Executive power exists antecedently to, and independently of, legislation; and its scope must be at least equal to that of the legislative power – exercised or unexercised. For the exercise of many executive powers no legislation is needed, and this is especially the case in the administration of external affairs. In the very matter under discussion – the maintenance of treaty obligations – there has been no legislation by the States, and none is required. But the Commonwealth, by virtue of the legislative power vested in it, is now responsible for the performance of these obligations, and must have the

62 A Deakin, "Channel of Communication with Imperial Government: Position of Consuls: Executive Power of the Commonwealth", in P Brazil & B Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia with opinions of Solicitors-General and the Attorney-General's Department*, Vol I, 129.

63 Ibid 131.

executive power necessary to fulfil all its obligations.

… section 61 points also to executive powers which belong to prerogative. ‘The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative.’ These words are advisedly declaratory, not enacting; they express the broad constitutional principle that the whole body of the prerogative, so far as it is capable of exercise in relation to the affairs of the Commonwealth, is exercisable by the Governor-General and, of course, exercisable, in accordance with the principles of responsible government, by and with the advice of Commonwealth Ministers.

Shorn of prerogative powers, the Commonwealth Executive would be a mere appendage to the Parliament – a board of subordinate officers exercising such powers as might be conferred upon it, but without independent authority of any kind. Such a conception of the executive is wholly at variance not only with every principle of English constitutional law, but with the clear and unmistakable provisions of the Constitution. Responsible government, though far more clearly established there than in any of the State Constitutions, would then be much more restricted in authority, character, and domain than it is in the States under their less explicit charters. ‘The King’s Ministers of State for the Commonwealth’ – so described for the first time in a great constitutional document – would, individually and collectively, be less His Majesty’s Ministers than are the members of the State Executives; the vast fund of powers held by the Crown in trust for the people would disappear; and the Commonwealth, instead of inheriting the fullest development of constitutional rights and privileges, would find its new political organisation had dwindled from a national to a municipal body, for making and executing continental by-laws.

When one first reads this, it is tempting to conclude that Deakin has expressed a view that, as the third paragraph above put it, "section 61 points also to executive powers which belong to the prerogative". Absent an understanding that the executive power of government is part of, but not the whole of, the prerogatives of the Crown, it is easy to form the conclusion that Deakin has expressed a view that the opening words of s 61 textually incorporate the prerogatives of the Crown into the constitutional text.

Such a reading of the *Vondel* opinion would be a mistake. When careful attention is applied to all four quoted paragraphs, it can be seen that Deakin's view of the executive power of the Commonwealth and his description of the prerogative is consistent with the core argument. Deakin made five points.

First, there is a "fundamental consideration" which can "scarcely be overestimated", and that is the "executive *authority*" (note, *authority*, not *power*) of the Commonwealth is derived from its fountain-head, "the Crown".

Second, Deakin made the point that in addition to executive power erected by statute, "section 61 points also to executive powers which belong to the prerogative". He recited the opening words of s 61 of the Constitution, and then said that these "words are advisedly declaratory, not enacting; they express the broad constitutional principle that the whole body of the prerogative is exercisable by the Governor-General". In asserting this, Deakin should not be understood to be saying that the opening words of s 61 of the Constitution incorporate (or are "*enacting*") the prerogative, rather, he should be understood as affirming that section 61 "points also to executive powers which belong to the prerogative", that is, the section "points" to (not "includes") those executive powers "which belong to prerogative", that is, the prerogative is the larger doctrine, and executive power is a species of prerogative.

Third, Deakin's affirmation that the words are "advisedly declaratory, not enacting" is consistent with the core argument herein advanced that the executive power is an existing

species of constitutional authority that pre-dates Federation, and the affirmation does not concern the prerogative.

Fourth, when carefully read, Deakin's description of the opening words of s 61 of the Constitution as "advisedly declaratory, not enacting," coupled with his observation that the words express the broad constitutional principle that the whole body of the prerogative … is exercisable by the Governor-General" is directly on point in respect of the core argument. That is, the whole body of the prerogative is *exercisable* by the Governor-General, meaning that the textual recognition or affirmation of the prerogative is to be found elsewhere to s 61, but, by operation of s 61 being the power to execute and maintain the Constitution, the prerogative (having been recognised or affirmed somewhere else in the Constitution) is *exercisable* by the Governor-General. It is the power to exercise, or give expression to, a constitutional attribute, not a source of the constitutional attribute. This is consistent with Dixon J's description of the prerogative as an "adjunct" to the executive power.[64]

Fifth, this conclusion is further reinforced by Deakin's description of the "Commonwealth Executive" if it was "[s]horn of prerogative powers". Deakin then made a reference that required familiarity with the origins of the text, *Toy v Musgrove*, and the framers' inclusion of the words "and shall be the Queen's Ministers of State for the Commonwealth", in the words of s 64 of the Constitution. Deakin's description of "[t]he King's Ministers of State for the Commonwealth", is taken directly from s 64 of the Constitution, and is a reminder of the contents of the Debates of the First Convention on 6 April 1891.[65] Deakin's observation that these words were used "for the first time in a great constitutional document", supports the argument that the "the vast fund of powers held by the Crown in trust for the people" were recognised in, or affirmed by, the Constitution through the use of those words in s 64. Deakin's use of the words, the "King's Ministers of

64 (1947) 74 CLR 508, 531.

65 The expression "Queen's Ministers of State" is, by then in 1902, expressed as the "King's Ministers of State", as a consequence of the accession of Edward VII.

State for the Commonwealth", and what that affirmation means gives context to his earlier statements that "section 61 points also to executive power which belong to prerogative", and that the opening words of s 61 are "declaratory, not enacting", that the prerogative "is exercisable by the Governor-General". The context permits the conclusion to be drawn that Deakin saw s 61 as a declaration that the prerogative is exercisable by the Governor-General, but not expressly sourced in s 61 of the Constitution. Indeed, having regard to the contents of the fourth paragraph quoted above, it is clear that Deakin saw the words "and shall be the Queen's Ministers of State for the Commonwealth", as being a textual recognition or affirmation of the continued operation of the prerogatives of the Crown in the context of the Commonwealth.

Alfred Deakin's *Vondel* opinion has been cited to illustrate the strength of the core argument. Deakin was a delegate to the Conventions. He made detailed addresses to the First and Second Conventions about the textual recognition, devolution and investment of the prerogatives of the Crown in the then Commonwealth Bill. Deakin was considered to be learned in the law, and he was the first occupant of the office of Attorney-General for the Commonwealth. The fact that Deakin was recorded as providing his official opinion in a way (this author says) that accords with the core argument ought to be afforded interpretative weight, and acts as a further pillar to the core argument.

CHAPTER SEVEN

RECENT DEVELOPMENTS

I INTRODUCTION

It has been the purpose of this dissertation to argue that the Constitution recognises and affirms the prerogative – not through the text of s 61, and not through any inherent view of the executive power of the Commonwealth, but through the affirmations in s 64. The core argument, emanating from first principles as it does, is not the totality of the argument. The substratum of the core argument identified a collection of textual, structural and historical reasons why the core argument ought to be accepted. In this chapter, some aspects of the High Court of Australia's two most recent executive power cases – *Williams [No 2]* and *Plaintiff M68* – are considered, to identify where the core argument accords (or fails to accord) with the emerging jurisprudence. This chapter also reflects upon curial supervision and restraint of the exercise of the prerogative, as well as reflecting more generally on the prerogative as a core aspect of a political constitution.

II *WILLIAMS [NO 2]*

A recent High Court decision that shines light on the doctrinal foundations of the executive power of the Commonwealth is the *Second School Chaplains' case*, *Williams [No 2]*.[1] The plurality judgment consisted of five of the Court's members; with the sixth, Crennan J, delivering a separate, but concurring set of reasons.[2] Lengthy as they are, paragraphs [80]

1 (2014) 252 CLR 416.

2 (2014) 252 CLR 416, 471 [99].

to [83] are worth reciting in full as those paragraphs are the most recent authoritative statement of principle by the High Court. In *Williams [No 2]* the plurality said:[3]

> [80] The history of British constitutional practice is important to a proper understanding of the executive power of the Commonwealth. That history illuminates such matters as why ss 53-56 of the Constitution make the provisions they do about the powers of the Houses of the Parliament in respect of legislation, appropriation bills, tax bills and recommendation of money votes. It illuminates ss 81-83 and their provisions about the Consolidated Revenue Fund, expenditure charged on the Consolidated Revenue Fund and appropriation. But it says nothing at all about any of the other provisions of Ch IV of the Constitution, such as ss 84 and 85 (about transfer of officers and property), ss 86-91 (about customs, excise and bounties), s 92 (about trade, commerce and intercourse among the States), or ss 93-96 (about payments to States). And questions about the ambit of the Executive's power to spend must be decided in light of *all* of the relevant provisions of the Constitution, not just those which derive from British constitutional practice.
>
> [81] Consideration of the executive power of the Commonwealth will be assisted by reference to British constitutional history. But the determination of the ambit of the executive power of the Commonwealth cannot begin from a premise that the ambit of that executive power must be the same as the ambit of British executive power.
>
> [82] It may be assumed that, as the Commonwealth parties submitted, "what might be described as the inherent or traditional limits on executive power, as

3 (2014) 252 CLR 416, 469 (French CJ, Hayne, Kiefel, Bell and Keane JJ.)

> they emerged from the historical relationship between Parliament [*at Westminster*] and the Executive, have not hitherto been treated [in Australia or, for that matter, in Britain] as the source of any general limitation on the ability of the Executive to spend and contract without legislative authority". But it by no means follows from this observation that the Commonwealth can be assumed to have an executive power to spend and contract which is the same as the power of the British Executive.
>
> [83] This assumption, which underpinned the arguments advanced by the Commonwealth parties about executive power, denies the "basal consideration" that the Constitution effects a distribution of powers and functions between the Commonwealth and the States. The polity which, as the Commonwealth parties rightly submitted, must "possess all the powers that it needs in order to function as a polity" is the central polity of a federation in which independent governments exist in the one area and exercise powers in different fields of action carefully defined by law. It is not a polity organised and operating under a unitary system or under a flexible constitution where the Parliament is supreme. The assumption underpinning the Commonwealth parties' submissions about executive power is not right and should be rejected.

The contents of these paragraphs give considerable support to the core argument, or to a number of aspects of the core argument.

First, it has been opined that the executive power of the Commonwealth ought to be construed, and its scope determined, in a functionalist sense. That is, the executive power of the Commonwealth, legislative power of the Commonwealth, and judicial power of the Commonwealth ought to be defined and construed in contradistinction to one another; that is, in a functionalist sense – the power to make, execute or administer, or interpret the laws of the Commonwealth. Another way of saying this is that the executive power is

understood in a correlative sense. *Williams [No 2]* provides considerable authority for this proposition when the plurality expressly accepted the Commonwealth's two submissions that: "a polity must possess all the powers that it needs in order to function as a polity"; and "the executive power is all that power of a polity that is not legislative or judicial power". In accepting these submissions, the High Court has implicitly adopted what this author has described as the functionalist and correlative description of executive power.

Second, whilst the Court observed that "[t]he history of British constitutional practice is important to a proper understanding of the executive power of the Commonwealth" it also observed that that history illuminated some provisions of the Constitution, but "says nothing" about a variety of other provisions in the Constitution which are an aspect of the executive government. In doing so, the High Court hints at a construction of the executive power of the Commonwealth in similar terms to the "executive Power of the President" in the United States. In the *United States Constitution*, some of the express executive powers (as opposed to the general vesting of executive power in the President by Article II, section 1) are executive powers that have been replicated in the American constitutional text, and cherry-picked from the prerogatives of the British Sovereign soon after the War of Independence. In this sense, "British constitutional practice" does indeed "illuminate" the construction of these powers or functions in the *United States Constitution*. Similarly, just as there are "other provisions" of the Constitution that British constitutional practice "says nothing at all about", like ss 84 and 85 (the transfer of officers and property to the Commonwealth), ss 86-91 (in relation to customs, excise and bounties), or ss 93-96 (in relation to payments to the States), there are provisions of the *United States Constitution* which concern the executive power, and the executive government, which British constitutional practice says nothing about.

Quite apart from the fact that the declaration that "the executive power of the Commonwealth *is* vested in the Queen" is a declaration of an existing fact, this does not prohibit the executive power of the Commonwealth being construed in accordance with the core argument – as a power whose scope is ascertained in a functionalist sense, and is

modified to the extent of the express and implied requirements of the Constitution. That is, it is the power to execute and maintain (or administer) the Constitution and the laws of the Commonwealth, modified so as to include those express executive functions (or particular powers) that the Constitution vests in the Queen, or her representative, the Governor-General. Examples of those express executive functions (or particular powers) include those functions or powers that have been cherry-picked from the prerogative – like the power to summon, prorogue and dissolve the Parliament,[4] or appoint or dismiss the Queen's ministers of state.[5] Those traditional prerogative powers have been crystallised into express executive powers through their express recognition in the constitutional text. To summarise this point: the High Court in *Williams [No 2]* has begun the process of construing the executive power of the Commonwealth in the same way as the Supreme Court of the United States has construed the executive power of the President – by describing the power in a functionalist and correlative sense, and by identifying that there are aspects of the power that are borrowed from (or "illuminated") by British constitutional practice, and there are aspects of the power that are autochthonous to the Australian constitutional framework.

III *PLAINTIFF M68* AND THE REASONS OF GAGELER J

The most recent decision of the High Court which involved a close examination of the executive power of the Commonwealth was *Plaintiff M68*, which was heard in October 2015, with judgment proclaimed and reasons published on 3 February 2016. The case concerned the Commonwealth's ability to process "unlawful non-citizens" off-shore in the Republic of Nauru at a regional processing centre.

All seven justices considered aspects of the non-statutory executive power. Gageler J (over more than 18 pages of *The Commonwealth Law Reports*),[6] set out what amounts to

4 The Constitution, s 5.

5 The Constitution, s 64.

6 (2016) 257 CLR 42, 90-109 [115]-[175].

almost a general theory of the executive power of the Commonwealth. Whilst no other justice (or any party) thought it necessary to express a comprehensive view on the executive power, and none of the parties made submissions to that effect, Gageler J used *Plaintiff M68* to advance (as pure obiter) some of his rather novel views. There are two aspects which ought (for the present purposes) to be highlighted.

Attention is drawn to the overarching theme of his Honour's reasons in *Plaintiff M68* – namely, functionality, or functionalism. Gageler J identified Professor Finn's description of the Crown as "a personalized and functional view of the Queen".[7] His Honour described the "peculiarly functionalised" conception in which the framers, and their forefathers, established responsible government in the Australian colonies.

His Honour's identification of the "careful appropriation and adaption of constitutional precedent to local circumstances" in crafting the role of the executive government and its relationship with the Parliament and the Judicature,[8] accords with the role of the executive power described in the core argument articulated in Chapter 5.

Attention is also drawn to the way his Honour commenced his consideration of the "executive government in the constitution". Gageler J started by explaining the operation of the executive government in terms of how "[t]he framers of the Australian Constitution engaged in … appropriation and adaption of constitutional precedent".[9] Gageler J said that the executive power "can only be understood within [a] historical and structural constitutional context".[10] His Honour grounded his understanding of the executive government upon an originalist form of interpretation. In contrast with many earlier cases, his Honour did not cite one word from the *Official Records*, or anything done at the Federation Conventions. His Honour might have sought to describe an originalist view; but his originalism isn't directly anchored to the authorial intention. The risk associated with

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7 (2016) 257 CLR 42, 394 [117], quoting from P Finn, *Law and Government in Colonial Australia*, 1987, 4.

8 (2016) 257 CLR 42, 393-394 [115].

9 (2016) 257 CLR 42, 393-394 [115].

10 (2016) 257 CLR 42, 397 [129].

articulating a historically-anchored theory of the Constitution without reference to the Federation Conventions is evident in his Honour's recitation of the description of the Commonwealth ministers as the "Ministers of State for the Commonwealth"[11] in s 64. The clear purpose behind the incorporation of that was to affirm that the "Queen's Ministers of State for the Commonwealth", were recognised as being able to exercise the prerogatives of the Crown that were appropriate to the newly established Commonwealth polity.

There are two aspects of his Honour's theory about "the nature of executive power" and the "[l]imitations on executive power" that touched upon the relationship between the prerogatives of the Crown and the executive power of the Commonwealth that ought be highlighted.

The first concerned a consequence of the true nature of the relationship between the prerogatives and the executive power. In *Plaintiff M68*, Gageler J referred to the decision of Brennan J in *Davis v Commonwealth*,[12] and, adopting Sir Gerard's language, referred exclusively to the depth of Commonwealth executive power when he said that "an act done in execution of an executive power of the Commonwealth is done in execution of one of three categories of powers or capacities: a statutory (non-prerogative) power or capacity, a prerogative (non-statutory) power or capacity, or a capacity which is neither a statutory nor a prerogative capacity".[13] Gageler J explained:[14]

> In framing those categories of actions which the Executive Government is empowered to undertake in relation to subject-matters with respect to which the Executive Government is empowered to act, Brennan J used the term "prerogative" in the strict and narrow sense in which it had been used by Sir William Blackstone in the middle of the eighteenth century: to refer only to

11 (2016) 257 CLR 42, 395 [119].
12 (1988) 166 CLR 79, 108.
13 (2016) 257 CLR 42, 398 [132].
14 (2016) 257 CLR 42, 398-399 [133] (Internal footnotes omitted).

> "those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects". He framed the second and third categories of permissible acts so as together to cover the wider sense in which Professor Dicey had used the same term in the late nineteenth century, after the emergence of responsible government in the United Kingdom: to refer to "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown" and thereby to encompass "[e]very act which the executive government can lawfully do without the authority of [an] Act of Parliament".

Gageler J went on to say in *Plaintiff M68* that:[15]

> The tripartite categorisation posited by Brennan J has utility in highlighting, in relation to acts done in the exercise of a non-statutory power or capacity, the essential difference between an act done in the execution of a prerogative executive power and an act done in the execution of a non-prerogative executive capacity.
>
> An act done in the execution of a prerogative executive power is an act which is capable of interfering with legal rights of others. An act done in the execution of a non-prerogative executive capacity, in contrast, involves nothing more than the utilisation of a bare capacity or permission, which can also be described as ability to act or as a "faculty". Such effects as the act might have on legal rights or juridical relations result not from the act being uniquely that of the Executive Government but from the application to the act of the same substantive law as would be applicable in respect of the act had it been done by any other actor. In

15 (2016) 257 CLR 42, 399 [134]-[135] (Internal footnotes omitted).

> this respect, the Executive Government "is affected by the condition of the general law". Subject to statute, and to the limited extent to which the operation of the common law accommodates to the continued existence of "those rights and capacities which the King enjoys alone" and which are therefore properly to be categorised as prerogative, the Executive Government must take the civil and criminal law as the Executive Government finds it, and must suffer the civil and criminal consequences of any breach.

There is much to commend this view. His Honour's explanation that an act done in the execution of the prerogative is capable of interfering with the legal rights of others, whereas, an act done in execution of a non-prerogative right or capacity "involves nothing more than the utilisation of a bare capacity or permission", perfectly accords with the relationship between the prerogative and the executive power advocated for in the core argument. It is *the prerogative* right or capacity which (according to the common law) permits the Crown to change legal rights (like declaring war, bestowing honours, et cetera); the executive power is merely the constitutional authority to give this right or capacity effect within the machinery of government.

Additionally, his Honour's contrasting of a prerogative right or capacity with either a statutory, or non-statutory (and non-prerogative) right or capacity, as a "bare capacity or permission", in this author's view correctly, reflects the nature of the right or capacity which is able to be executed or maintained pursuant to s 61 of the Constitution. Non-prerogative rights or capacities (that is, statutory executive power, and non-statutory executive power which does not rely upon the common law of the Crown) does not permit, of itself, the creation or changing of legal rights as between parties. The authority permitted by s 61 is a bare capacity or permission. This way of describing the role of a prerogative right or capacity, as being given administrative effect by s 61 squares comfortably with the description of the prerogative as "an adjunct" of the executive power

of the Commonwealth by Dixon J in *Richard Foreman & Sons*.[16] This explanation also has the advantage that as a matter of constitutional policy, it reduces the likelihood or capacity for the Commonwealth to attempt to find new non-prerogative rights or capacities within the non-statutory executive power of the Commonwealth by inferring from the text of the Constitution some right or capacity which would permit the executive government of the Commonwealth to adjust the rights of parties without a statutory (or prerogative) basis.

There is a second aspect of his Honour's reasons that warrants attention in the present context in what Gageler J said about the textual recognition of the prerogative rights, capacities and immunities in the Constitution. Gageler J said in *Plaintiff M68* that:[17]

> The tripartite categorisation posited by Brennan J [in *Davis*] also has utility in highlighting, in relation to acts done by the Executive Government in the exercise of non-statutory power or capacity, the essential similarity between an act done in the execution of a prerogative executive power or capacity and an act done in the execution of a non-prerogative executive capacity. The essential similarity lies in the identity of their provenance.
>
> Non-prerogative executive capacities, no less than prerogative executive powers and capacities, are within the non-statutory executive power of the Commonwealth which is constitutionally conferred by s 61 of the Constitution and which is accordingly constitutionally limited by s 61 of the Constitution. Its constitutional limits are to be understood (as distinct from merely interpreted) in light of the purpose of Ch II being to establish the Executive Government as a national responsible government and in light of constitutional history and the tradition of the common law.

16 (1947) 74 CLR 508, 531.

17 (2016) 257 CLR 42, 400 [137] and [138].

With respect, this identification of the "*provenance*" of the prerogative "executive power or capacity", and the non-prerogative "executive capacities" as being "constitutionally conferred by s 61 of the Constitution" should not be accepted as correct constitutional principle. To do so would be to ignore the matters set out in Chapter 5 and 6, and would ignore the work that the framers intended the phrase, "and shall be the Queen's Ministers of State for the Commonwealth" to do in s 64 of the Constitution. The provenance of the prerogative executive rights, preferences, capacities and immunities is the common law; section 61 provides the constitutional machinery for operationalising these rights, preferences, capacities and immunities.

IV IMPLICATIONS FOR JUDICIAL REVIEW

A noticeable development over the past two decades in Australian constitutional law has been the anchoring of the principles of judicial review to the text and structure of the Constitution.[18] This constitutionalisation of judicial review has resulted in the retention of the distinction between errors within jurisdiction, and errors outside jurisdiction,[19] whereas Britain has abolished the distinction.[20] The constitutionalisation of judicial review has also seen the entrenchment of the availability of prerogative (or constitutional writs) in Federal courts,[21] and the entrenchment of the supervisory jurisdiction in the State courts.[22]

The constitutionalisation of judicial review also required the anchoring of the purpose and tools of judicial review to the constitutional text. If the principle of legality is implicit in the Constitution, then the limits, and proper purpose, of judicial review (in terms of reviewing legislative enterprise, or executive action) comes into sharp focus.

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18 S Gageler, "Deference", (2015) 22 AJ Admin L 151; see also A P Greenwood, "*Judicial Review of the Exercise of Discretionary Public Power*", Address given to the Queensland Chapter of the Australian Institute of Administrative Law, Brisbane, 27 April 2017.

19 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

20 *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682.

21 *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82.

22 *Kirk v Industrial Court of New South Wales* (2009) 239 CLR 531, 580-581 [98]-[99] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

If the core argument is correct, and the prerogative is *merely* executed and maintained by the executive power of the Commonwealth, and is recognised by the common law, then the question becomes, what is the purpose and limits of judicially reviewing a purported act of prerogative authority? Attention needs to be focused upon whether the traditional procedural review versus merits (or substantive) review distinction[23] ought to remain. Attention also needs to focus upon how the courts should ascertain justiciability. Finally, the utility of an explicit doctrine of judicial restraint and deference ought to be considered. These matters are topics for consideration that arise as a consequence of the way in which the prerogative operates in Australian constitutional law.

These issues are equally engaged by an examination of the purpose and limits of judicial review of both statutory executive power, as well as non-statutory executive power. This author wishes to also focus upon the possibility (and, indeed, desirability) for there to be a difference in the purpose and limits between non-prerogative executive power and prerogative executive power.

In considering these aspects of judicial review, it is suggested that assistance can be drawn by examining the British position, particularly through the lens of the House of Lords' decision in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*.[24] This decision was one of the House of Lords' last appeals which concerned the recognition and reviewability of the prerogative. *Bancoult [No 2]* was a controversial decision, and the litigation associated with the controversy continues to be the subject of curial attention.[25]

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23 *Kioa v West* (1985) 159 CLR 550, 622 (Brennan J); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J); *Abede v Commonwealth* (1999) 197 CLR 510, 579-580 [195] (Gummow and Hayne JJ) and 587 [223] (Kirby J); *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651-652 [132] (Gummow J); *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 174 [23] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

24 [2009] 1 AC 453 ("*Bancoult [No 2]*")

25 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2016] UKSC 35; [2016] WLR (D) 344; *R (Bancoult (No 3) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 708.

Since *R v Criminal Injuries Compensation; Ex parte Lain*,[26] and affirmed in *Council of Civil Service v Minister for the Civil Service*,[27] it has been orthodox that an exercise of prerogative right is amenable to judicial review, where the exercise of the prerogative right is thought to be justiciable. This development has received some recognition in the High Court of Australia,[28] but it is still yet to be authoritatively confirmed by the Court.[29] In *Bancoult [No 2]*, Hoffman LJ observed that:[30]

> The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality; although it may be legislative in character, it is still an exercise of power by the executive alone. Until the decision of this House in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, it may have been assumed that the exercise of prerogative powers was, as such, immune from judicial review. That objection being removed, I see no reasons why prerogative legislation should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.

All five Law Lords agreed that the delegated legislation (emanating from an Order in Council, and therefore the prerogative) is judicially reviewable.[31]

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26 [1967] 2 QB 864.

27 [1985] 1 AC 374.

28 *Attorney-General v Quin* (1990) 170 CLR 1, 35 (Brennan J).

29 M Aronson, et al, *Judicial Review of Administrative Action and Government Liability*, 134 [3.110].

30 [2009] 1 AC 453, 482-483 [35].

31 *Bancoult [No 2]* [2009] 1 AC 453, 482-483 [35] (Lord Hoffman), at 490 [69] (Lord Bingham), at 502 [105] (Lord Rodger), at 508 [122] (Lord Carswell), at 515-516 [141] (Lord Mance).

In drawing the core argument, and therefore describing the executive power of the Commonwealth as something different in nature and differently sourced, to the prerogative, there presents the question: is the exercise of the prerogative to be judicially reviewed in anyway different from the exercise of statutory executive power, or non-prerogative non-statutory executive power?

Statutory executive power does not present a significant analytical challenge. Gone are the days in which the Commonwealth Parliament enacted short statutes to achieve legislative objectives, permitting and requiring the executive officers of the Commonwealth to "fill in" the gaps between the legislative activity, and the executive action required to administer those brief statutes. For example, unlike the *Immigration Restriction Act 1901*,[32] the *Migration Act 1958* spells out in great detail the machinery of the decision-making activities of executive officers of the Commonwealth. The comprehensiveness (and complexity) of the drafting of modern statutes has resulted in a much reduced domain for officers of the executive government to exercise choice and discretion in the invocation of statutory powers; primarily because in so many areas of government activity, the legislature has provided the executive with a near-code.

Non-prerogative non-statutory executive powers present a much greater challenge, and are not as analytically straight forward as statutory executive power. The non-prerogative non-executive power must be sourced in the express or implied terms of the Constitution. It arises because s 61 charges the Queen with the execution and maintenance "of this Constitution". The articulation of a constitutional right which does not find explicit expression in the Constitution is fraught with analytical difficulty; so too is the determination of limits of that right. For example, putting aside prerogative rights, preferences, capacities, and immunities, what other constitutional doctrines or constitutional principles (either expressly or implicitly) does the Constitution permit the executive to execute or maintain?

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32 The *Immigration Restriction Act 1901* comprised of a mere 19 sections and ran for just 7 pages of the then Commonwealth statute book.

It is not the role of this dissertation to articulate a comprehensive theory of non-statutory executive power. Nonetheless – the chameleon doctrine aside – it must be the case that non-statutory executive power must be, generally speaking, executive in nature. That is, a function or activity that is characterised as executive – it cannot be legislative or judicial in character. That is not to say that it must be *purely* understood in Montesquieuian terms as being strictly "executive". After all, the High Court looks to English legal history to determine what *functions* are properly reposed in the Courts.[33] Similarly, an examination of English and Australian legal and political history can aid and assist in characterising a *function* as executive; but executive it must be to be a non-prerogative non-statutory executive power. Therefore, generally speaking,[34] acts or activities that *alter, by way of creating* the rights of parties are not executive, they are legislative or judicial in nature. Recognising that this assertion does not sit comfortably with *Griffith University v Tang*,[35] there is a qualitative distinction between the alteration of rights as a consequence of administrative decision-making *under an enactment*, and the promulgation of new rights and obligations.

Prerogative non-statutory executive powers – or, properly expressed, non-statutory powers arising from the execution and maintenance of the prerogatives of the Crown – are different in character. The execution and maintenance of those powers may (and, quite often does) result in *an alteration* of an individual's rights. When the Crown declares war, the Crown alters the rights of those who have an allegiance to a hostile Sovereign. When the Crown bestows honours, the Crown alters the rights of those who receive an honour. And when the Crown exercises a proprietary right, like the right to royal metals, the Crown

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33 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 (Windeyer J).

34 And recognising that the High Court has acknowledged that "the affecting of legal rights and obligations" is necessarily an aspect of a decision of an administrative character: *Griffith University v Tang* (2005) 221 CLR 99, 128 [79]-[80] (Gummow, Callinan and Heydon JJ).

35 (2005) 221 CLR 99.

is altering the rights of those who might have had quiet enjoyment of their lands when the Crown seeks to retrieve the gold and silver that it has a proprietary right to.

Whilst it is reasonable for a court to consider whether the right or rights exist, the substantive review of those rights, that is, the review of them for some reason other than the continued availability of the right (which crystallised in British jurisprudence in *Bancoult [No 2]*), in terms of some of the standards of review – like unreasonableness – is inconsistent with the text and structure of the Australian Constitution.[36] The pre-Federation position (and the understanding that the framers almost certainly had, but perhaps contrary to English law)[37] was that if a court concluded that the prerogative right, preference, capacity or immunity had been engaged, then that was the end of the matter – there was no review of the exercise of that power for unreasonableness or proportionality because the exercise of prerogative powers was, historically, not apt for judicial review.

The execution and maintenance of a prerogative (or common law) right, preference or capacity of the Crown (as understood in the Blackstonian sense) is just that – the execution or maintenance of the common law attribute of the Crown. Whilst the execution or maintenance may be reviewed – that is, the act done to give effect to the right, preference or immunity may be judicially reviewed, the very nature of the prerogative right does not admit substantive review as to whether the executive action is warranted.

In a system of government that implicitly adopts a division of legislative, executive and judicial powers, and which also impliedly provides for ministerial responsibility to the elected legislature, there is little room for the justiciability of exercises of the prerogatives,

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36 *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 24-25 [76] (McHugh and Gummow JJ); see also *Attorney-General v Quin* (1990) 170 CLR 1, 35 and 36 (Brennan J), *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986)162 CLR 24, 40 (Mason J).

37 *Sharp v Wakefield* [1891] AC 173 (Lord Halsbury LC), who said that in the exercise of a discretion, the proper exercise of a discretion requires "that something is to be done according to the rules of reason and justice, not according to private opinion" (at 173); The Lord Chancellor cited Coke LCJ in *Rooke's Case* (1598) 5 Rep. 99b as authority for that proposition. The Lord Chancellor added that the exercise of discretionary power be "not arbitrary, vague, and fanciful, but legal and regular" (at 179). See an affirmation of this in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 363 (Hayne, Kiefel and Bell JJ).

beyond mere procedural review. In a system of government that incorporates both a separation of powers as well as responsible government, accountability for the exercise of powers that alter rights (and, are therefore not usually justiciable) lies with the legislature. That accountability is political and ought to be rendered at the dispatch box and in parliamentary committees.

This observation is a significant one as it has other consequences. The prerogatives are the prerogatives of the Crown. They are exercisable by the governor-general and his or her delegate officers of the Commonwealth. But there is an implicit limitation in that observation. The prerogatives, being common law attributes of the Crown which permit the alteration of rights may only be exercised by the governor-general, or his or her ministers and their delegates – being persons whose exercise of those common law attributes can be held to account in, and by, the legislature. There is a special quality to the exercise of powers where the person exercising that power is both legally and politically accountable for the exercise of the power. Officers of statutory agencies, who are not under the command of one of the Queen's ministers of state charged with administering that department of state, do not have a superior who is answerable at the dispatch box for the exercise of power. This is both a textual and structural requirement of the Constitution. It is an implication drawn from the language of s 64 of the Constitution.

An officer of a statutory agency (which is not under the command of one of the Queen's ministers of state) is limited to the exercise of statutory executive power; such an officer cannot exercise on the governor-general's behalf the prerogatives of the Crown. For example, an officer of the Australian Fisheries Management Authority might be exercising power on behalf of the Commonwealth (as part of a Commonwealth statutory agency) under the *Fisheries Management Act 1991* and the *Fisheries Administration Act 1991*, but that power that he or she exercises is exclusively statutory executive power. The exercise of that power is limited to the language of the statute. The authority to take executive action pursuant to a non-statutory executive power, or to execute or maintain a common law attribute of the Crown is a power vested exclusively in those who are either personally,

or through their masters, answerable to Parliament, in the sense that the minister is able to direct that executive action. This is a necessary structural implication arising as a consequence of representative and responsible government.

In terms of judicial review of the prerogative non-statutory executive power (as well as non-prerogative non-statutory executive power), it is perhaps time for the High Court to revisit the question as to whether the Court should adopt an explicit standard of judicial deference or restraint when judicially reviewing executive action. As Lord Hope said in *R v Director of Public Prosecutions, Ex parte Kebilene* (in a slightly different context), sometimes:[38]

> …. difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be [impugned].

Whilst it might be said to be contrary to the principle in *Marbury v Madison*,[39] there may be some value in the emergence in Australian jurisprudence of a *Chevron*-like principle[40] of the courts deferring to the judgment of the executive arm of government (which has heretofore been resisted)[41] where the executive is better placed to make informed decisions about the appropriateness and reasonableness of different interpretative choices open to the executive. Extra-curially, Justice Gageler has averred to as much; arguing that a *Chevron*-

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38 [2000] 2 AC 326, 381.

39 1 Cranch 137 (1803).

40 *Chevron U.S.A. v. Natural Resources Defense Council* 467 US 837 (1984).

41 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151-152 [40]-[42] (Gleeson CJ, Gummow, Kirby and Hayne JJ) ("*City of Enfield*").

like principle of construction would be consistent with the principle in *Marbury v Madison*.[42] Justice Gageler said:[43]

> *Chevron* deference involves a court construing ambiguous language within an agency's empowering statute as including within the scope of the authority so conferred by the statute a capacity or discretion for the agency to adopt and to act on such interpretation of that ambiguous language as the agency considers to be appropriate, subject to the condition that the agency interpretation is reasonable.

Justice Gageler pointed out that *Chevron* deference was quite recently explained in the Supreme Court of the United States as follows:[44]

> *Chevron* is rooted in a background presumption of congressional intent: namely, "that Congress, when it left ambiguity in a statute" administered by an agency, "understood that the ambiguity would be resolved, first and foremost by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Chevron* thus provides a stable background rule against which Congress can legislate. Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.

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42 S Gageler, "Deference", (2015) 22 AJ Admin L 151, 156; and contrary to what was argued in *City of Enfield* (2000) 199 CLR 135, 152-153 [43].

43 S Gageler, "Deference", (2015) 22 AJ Admin L 151, 153.

44 S Gageler, "Deference", (2015) 22 AJ Admin L 151, 153, quoting *City of Arlington v Federal Communications Commission* 569 US __; 133 S Ct 1863, 1868 (2013).

Justice Gageler opined that:[45]

> The point of *Chevron*, not unlike the point of *Hickman*, is that the provision of the content of statutory language can be committed by statute to the zone of discretion, or authority or jurisdiction, conferred on an administrative decision-maker without violation of the judicial duty to ensure that the administrative agency stays within that zone of discretion.

There are textual and structural reasons why *Chevron* deference ought to emerge within Australian constitutional jurisprudence. Section 75(v) of the Constitution entrenches the availability of the writs of mandamus and prohibition. This provision is the source of the High Court's jurisdiction to review executive action. As Gleeson CJ said in *Plaintiff S157*, it "secures a basic element of the rule of law".[46]

Scalia J observed in *United States v Mead Corporation* (obviously in the American context), "[j]udicial control of federal executive officers [is] principally exercised through the prerogative writ of mandamus", and continued to observe that "[t]hat writ generally would not issue unless the executive officer was acting plainly beyond the scope of his authority".[47] As a consequence, ambiguities in the reach of executive authority should be "left to reasonable resolution by the Executive",[48] as they would have been by an Article III court reviewing the issuance of a writ of mandamus directing an executive officer to do (or forbearing from doing) some public duty or act.[49]

The same textual and structural reason exists within the Australian context. Section 75(v) entrenches the availability of the writ of mandamus to control the behaviour of

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45 S Gageler, "Deference", (2015) 22 AJ Admin L 151, 156.

46 (2003) 211 CLR 476, 482 [5].

47 533 US 218 (2001), 242; albeit, Scalia J was in dissent.

48 533 US 218 (2001), 243.

49 A Bamzai, "The Origins of Judicial Deference to Executive Interpretation" (2017) 126 *Yale Law Journal* 908, 913.

officers of the Commonwealth. As Gleeson CJ pointed out in *Plaintiff S157*, the framers sought to incorporate the three writs of s 75(v) for the expressed reason to ensure that the High Court could "exercise its function of protecting the subject against any violation of the Constitution or any law made under the Constitution".[50]

Just as the pre-Federation supervisory jurisdiction is entrenched within the text of s 73 of the Constitution,[51] the pre-Federation character and limitations of the writ of mandamus are incorporated into the operation of s 75(v) of the Constitution. As Thomas Tapping said in 1853:[52]

> The jurisdiction of the Court to command the execution of a particular act or duty, the subject matter of the writ [of mandamus], must be clear, otherwise it will not interfere.

If the duty is not clear, then it is ambiguous; and that ambiguity is resolved in favour of judicial deference to the exercise of executive power. The explicit entrenchment of the writ of mandamus in s 75(v) arguably leads to the conclusion that a *Chevron*-like doctrine of judicial deference has a role to play in Australian jurisprudence.

An explicit doctrine of judicial deference and restraint is not currently a part of Australian constitutional jurisprudence.[53] As Federal Court judge Nye Perram has said: "the flip side to the doctrine [of the separation of powers] is a prohibition on the judiciary usurping executive functions where they are reposed in the executive by legislation or directly by the [C]onstitution itself".[54] The emergence of doctrinal clarity around the

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50 (2003) 211 CLR 476, 482-483 [5].

51 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 580 [97]-[98] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

52 T Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus, as it obtains both in England, and in Ireland*, 63.

53 *City of Enfield* (2000) 199 CLR 135.

54 J Eyers, "Courts curb executive power", *The Australian Financial Review*, 3 September 2010, 39.

nature of the non-statutory executive power, and, as is argued for in this dissertation, the emergence of a prerogative non-statutory executive power which is understood in the context of the core argument, will require further examination as to whether there ought to be a principle of interpretation (therefore a restraint on reviewability) as to the institutional choices that are available to the executive government when seeking to invoke a non-statuary executive power or a prerogative right.

As was made abundantly clear by *Pape*, having established there was power, it is almost impossible for the High Court to substantively review (in the merit review sense) the exercise of a non-statutory executive power. The same could be said for the exercise of prerogative rights. The emergence of an explicit doctrine of judicial deference in Australia would sit comfortably against the backdrop of the prerogative understood as the common law recognised attributes of the Crown which are not ordinarily susceptible to judicial review.

V In Defence of the Prerogative

Reconciling the text, structure and history of the Constitution (particularly reconciling what it means to be "under the Crown") requires the anchoring of any theory of the prerogatives of the Crown to the constitutional framework established by the framers at the Federation Conventions. That framework cannot be truly described as historical if it is not anchored to the actual words and ideas expressed by the framers at the Federation Conventions. That is not to say that the subjective views of individual framers will be paramount; merely, any reconciliation of the text and structure with the history of the Constitution necessarily requires a reconciliation of the actual words and ideas expressed at the Federation Conventions, thereby anchoring the history if the collective intention of the framers' can be properly ascertained.

There can be no doubt that it was the collective intention of the framers that they were seeking to replicate representative and responsible government. They sought to include the Westminster system of government – that is ministerial (or Crown) responsibility to the

elected legislature – into the Australian Federal compact. Whilst the framers were drafting a *legal* document, utilising a written constitution; they were also seeking to replicate a *political* model of government, whereby, according to the Diceyan theory, the ultimate mechanism of accountability is through the ministers maintaining the confidence of the democratic chamber of parliament. The framers sought to establish both a legal constitution and a political constitution. The Australian Constitution incorporates both the political and legal theories of constitutionalism. To appropriate the words of Adam Tomkins in respect of the British Constitution, the Australian Constitution "uses politics as the vehicle through which the purpose of the constitution (that is, to check the government) may be accomplished".[55]

The continuing doctrinal relevance and strength of the prerogative (recognised as it is by the common law, and exercisable as it is by the Queen's ministers of state) is that the prerogative is, contrary to modern views, a robust and accountable part of a political constitution.[56] The ongoing *political accountability* for the exercise of the prerogative is regularly observable. Two examples will suffice.

The first example is the exercise of the war prerogative. The decision to commit Australian troops and military assets to the invasion of Saddam Hussein's Iraq in 2003 was taken by the ministry of the day in exercise of the prerogative right and capacity for the Crown to engage in military force. The decision was highly controversial, and the government of the day came under considerable political pressure to justify the initial decision to join United States' forces and participate in combat operations, and that decision's ongoing effects. The decision to participate in combat operations was a political issue at the subsequent Federal election in 2004, with the then Leader of the Federal Opposition committing to withdrawing the troops "by Christmas".[57] The government was

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55 A Tomkins, *Our Republican Constitution*, 3.

56 In the sense that the expression *political constitution* was used by JAG Griffith in "The Political Constitution", (1979) 42 *Modern Law Review* 1.

57 "PM attacks Latham's pull-out plan", abc.net.au, 24 March 2004. Retrieved 18 July 2016.

re-elected at the election, but it was necessary for the government to defend its exercise of the prerogative right and capacity in the political domain. The exercise and operation of the war prerogative has been criticised by informed commentators.[58] That criticism is focused upon strengthening the mechanisms for the *political* accountability for the exercise of the prerogative, rather than the mechanisms for *legal* accountability.

The second example is the exercise of the honours prerogative. The Sovereign is described as the fountain of honour.[59] The Queen retains the prerogative to establish, and amend, orders or societies of honour. For example, when the then prime minister advised the Queen to re-establish the practice of appointing Knights and Dames in the Order of Australia, the Queen exercised her prerogative right to amend the Constitution of the Order of Australia (a prerogative instrument) to give effect to those changes.[60] Similarly, and with much less media attention, when an earlier prime minister advised the Queen to grant to all living and future Governors-General the title of "The Honourable" for life, the decision was an exercise of the Queen's prerogative authority, and was made known by a notice in the *Commonwealth Gazette* advising that "Her Majesty The Queen has given approval for the title of "the Honourable" to be granted to Australian Governors-General".[61] A similar decision was made in relation to Administrators of the Northern Territory.[62] On each of these occasions, on the face of the gazette, it appears that *the Queen has exercised* the power, and the Governor-General is merely notifying that the right has been exercised.

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58 P Leahy, "Poor Intelligence Just One Strand in Iraq Involvement", *The Australian*, 8 July 2016, 12; J Brown, "Firing Line, Australia's Path to War", *Quarterly Essay*, Issue 62, 2016, 45, 48, 56-58.

59 W Blackstone, *Commentaries*, Vol I, 261-262.

60 *Commonwealth Gazette*, C2014G00635, "Amendments to the Constitution of the Order of Australia to reinstate appointments of Knights and Dames", 17 April 2014.

61 *Commonwealth Gazette*, C2013G00681, "The title 'the Honourable' for Governors-General", 8 May 2013.

62 *Commonwealth Gazette*, C2014G01261, "Title 'Honourable' for Administrators of the Northern Territory", 30 July 2014.

When the then prime minister recommended the appointment of the Duke of Edinburgh as a Knight of the Order of Australia, the prime minister suffered significant public ridicule, and, arguably, this event was a significant marker which led to the loss of the prime minister's political authority within his own party, ultimately contributing to the loss of his premiership.

The use and misuse of the prerogatives of the Crown engages the operation of the political constitution, with political consequences for the misuse of the prerogatives. Due to the inherently political nature of many of the prerogative's rights, preferences, capacities, and immunities it is often the case that the subject-matter of the exercise of the executive power to give effect to the common law right, preference, capacity or immunity defies substantive curial supervision. This does not (to borrow a phrase) "create islands of power immune from supervision and restraint",[63] rather, the supervision and restraint is achieved through political means, just as the framers envisaged and responsible government requires.

By affirming that the *source* of the rights, preferences, capacities and immunities of the Crown is the Crown (and recognised by the common law), the High Court would be permitting the continuation of the best (ascertainable) understanding of the framers' understanding of the place and role of the prerogative in the Constitution. And in doing so, would leave the resolution of the tension between the exercise of the Crown's rights, and the interests of individual members of the community, to the elected arms of government. In doing so, the tension between the interests of the individual, and the interests of the Crown requires (to borrow a statement from a different context) "the political articulation of a community's sense of itself, an articulation which, as our institutions have evolved, is the province of the legislature rather than the judiciary".[64]

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63 *Kirk v Industrial Court of New South Wales* (2009) 239 CLR 531, 581 [99].

64 P A Keane, "Legal History and Lawyers", in A Rahemtula and M Sayers, *The Idea of Legal History, A Tribute in Honour of Dr Michael White QC*, 20, 21.

VI Conclusion

When reflecting upon the Constitution soon after its centenary, after pointing out the origin of the "apparently innocuous words" (being, "and shall be the Queen's Ministers of State for the Commonwealth) in s 64 of the Constitution, Dr John Waugh wrote:[65]

> I do not mean to suggest that Deakin and Wrixon were right in 1891 about 'responsible ministers', or that the words they proposed for s 64 of the Constitution could have had the effects they intended. Readers of the Convention Debates are familiar with the delegates' intermittent muddles and confusion, and with intentions that miscarried or were simply rejected. My point is that a broad historical context is needed to explain the origins of the words of s 64. The Convention Debates are only the start. The context, assumptions and preconceptions of the 1890s are important too.

It has been the purpose of this dissertation to prove that Dr Waugh was too timid, and that the contribution made to the drafting of s 64 by Alfred Deakin and Henry Wrixon in 1891 is properly reflected in the construction of that section, and of the executive power of the Commonwealth.

Whilst the common law itself must accord with the Constitution, "the Constitution itself is informed by the common law". The common law of the Crown (and the prerogatives of the Crown that are recognised by the common law) are a textually affirmed aspect of the Constitution. The "context, assumptions and preconceptions" that existed in the lead up to the Federation Conventions, and in the drafting of the Constitution warrant that conclusion, and the core argument made in this dissertation.

Understanding the prerogative; what it is; where it came from; how it evolved throughout the course of Roman, English, British and then Australian history; and how it

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65 J Waugh, "Lawyers, Historians and Federation History", in R French, G Lindell and C Saunders (eds), *Reflections on the Australian Constitution*, 30.

predated the rise of the Montesquieuian trinity of powers, are all essential to understanding the prerogative's relationship with the executive function and power of government.

This dissertation has sought to demonstrate that the prerogative and the executive power are two separate constitutional concepts (both in history and within the text of the Australian Constitution). Within the text of the Constitution Act, the preamble, and ss 2 and 74 textually imply the continued operation of the prerogatives of the Crown (recognised as they are by the common law). Section 64, through the use of the expression "and shall be the Queen's Ministers of State for the Commonwealth", expressly affirms that the Queen continues to be invested with Her prerogative, and that (in combination with s 61) the Queen (acting through her delegates) exercising the executive power of the Commonwealth is the constitutional actor who is empowered to give executive, or administrative effect to those common law recognised rights, preferences, capacities and immunities which inhere within the Crown.

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